CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 33 JUNE 30, 1999 NO. 26

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decision

(T.D. 99–50)

REVOCATION OF UNIMAR, INC. INTERNATIONALAS A CUSTOMS APPROVED GAUGER AND ACCREDITED LABORATORY

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of Revocation of Unimar, Inc. International as a Customs Approved Gauger and Accredited Laboratory.

SUMMARY: Unimar, Inc. International of Houston Texas, a Customs approved gauger and accredited laboratory, under Section 151.13 of the Customs Regulations (19 CFR 151.13), was found in violation of 19 CFR 151.13 of the Customs Regulations. Specifically, Unimar, Inc. International sites located in Brownsville, Texas; Keansburg, New Jersey; and Houston, Texas were not following proper regulations and procedures regarding equipment and instrument calibration and record keeping. Further, as required under Section 151.13(b)(8) of the Customs Regulations, Unimar, Inc. International did not notify the Executive Director, Laboratories and Scientific Services, of the closing of their Gonzalez, Louisiana site. Accordingly, pursuant to 151.13(k) of the Customs Regulations, notice is hereby given that the Customs commercial gauger approval and laboratory accreditations given to Unimar, Inc. International have been revoked.

EFFECTIVE DATE: June 6, 1999

FOR FURTHER INFORMATION CONTACT: Mr. Ira Reese, Chief Science Officer, Laboratories and Scientific Services, U.S. Customs Service, 1300 Pennsylvania Ave., NW, Suite 5.5–B, Washington, DC 20229 at (202) 927–1060.

Dated: June 8, 1999.

GEORGE D. HEAVEY,
Executive Director,
Laboratories and Scientific Service.

[Published in the Federal Register, June 16, 1999 (64 FR 32304)]

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, June 16, 1999.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for Stuart P. Seidel, Assistant Commissioner,
Office of Regulations and Rulings.)

PROPOSED REVOCATION OF A RULING LETTER AND TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF A WOMEN'S JACKET AND SKIRT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of a tariff classification ruling letter and treatment relating to the tariff classification of a women's jacket and skirt.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of a women's jacket and skirt and any treatment previously accorded by Customs to substantially identical transactions. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before July 30, 1999.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W. Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Shirley Greitzer, Textile Branch (202) 927–1695

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of a women's jacket with contrasting colored piping and a matching skirt without the contrasting colored piping.

Although this notice is specifically referring to one ruling, New York Ruling Letter (NY) B86618, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise the Customs Service during this notice period. Similarly, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise the Customs Service of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the im-

porter or their agents for importations of merchandise subsequent to this notice.

In New York Ruling Letter (NY) B86618, dated July 8, 1997, a women's jacket with contrasting colored piping and a matching skirt without the piping were classified as follows: the jacket under subheading 6204.39.3010, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for "Women's or girls' suits, ensembles, suit-type jackets, blazers, dresses, skirts, divided skirts, trousers, bib and brace overalls, breeches and shorts (other than swimwear): suit-type jackets and blazers: Of other textile material: Of artificial fibers: Other: Women's."; the skirt under subheading 6204.59.3010, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for "Women's or girls' suits, ensembles, suit-type jackets, blazers, dresses, skirts, divided skirts, trousers, bib and brace overalls, breeches and shorts (other than swimwear): Skirts and divided skirts: Of other textile material: Of artificial fibers: Other: Other: Women's". Ruling B86618 is set forth as "Attachment A" to this document.

It is Customs view that where a jacket and skirt are of the same fabric construction, style, color, and composition, and are also of corresponding or compatible size, the garments are properly classifiable as a suit. Note 3(a) to chapter 62, Section XI, which was expanded after 1994, specifically allows for piping in a different fabric on a suit. Therefore the presence of different colored piping on the jacket, which is not present on the skirt, does not preclude classification of the garments as a suit. We therefore believe that such garments should have been classified in heading 6204, HTSUS, as a suit.

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to revoke NY B86618, and any other ruling not specifically identified on identical or substantially similar transactions to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed Headquarters Ruling Letter (HQ) 960843 (see "Attachment B" to this document) . Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: June 11, 1999.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
New York, NY, July 8, 1997.

CLA-2-62:RR:NC:TA:360 B86618
Category: Classification
Tariff No.: 6204.39.3010 And 6204.59.3010

MS. DONNA BEVER
AMERICAN SHIPPING COMPANY INC.
140 Sylvan Avenue
Englewood, NJ 07632

Re: The tariff classification of a woman's jacket and skirt from China and Hong Kong.

DEAR MS. BEVER:

In your letter dated June 16, 1997, you requested a classification ruling on behalf of The Dress Barn, Inc. The sample submitted with your request will be returned to you under separate cover.

Style J054 consists of a jacket and skirt constructed from 70 percent rayon and 30 percent polyester woven fabric. The fully lined jacket features long sleeves with two button trim, shoulder pads, a collar, lapels and a full front opening secured by four buttons. The jacket also has two welt pockets at the waist, two decorative flaps with button trim and contrast colored piping around the collar, lapels, front opening, chest flaps and pockets. The fully lined skirt features a waistband, a back zipper and button closure, side seam pockets and a back vent.

The applicable subheading for the **jacket** will be 6204.39.3010, Harmonized Tariff Schedule of the United States (HTS), which provides for women's or girls' suits, ensembles, suit-type jackets, blazers, dresses, skirts, divided skirts, trousers, bib and brace overalls, breeches and shorts (other than swimwear): suit-type jackets and blazers: of other textile materials: of artificial fibers: other: women's. The duty rate will be 28.5 percent ad valorem.

The applicable subheading for the **skirt** will be 6204.59.3010, Harmonized Tariff Schedule of the United States (HTS), which provides for women's or girls' suits, ensembles, suit-type jackets, blazers, dresses, skirts, divided skirts, trousers, bib and brace overalls, breeches and shorts (other than swimwear): skirts and divided skirts: of other textile materials: of artificial fibers: other: other: women's. The duty rate will be 16.7 percent ad valorem.

The **jacket** falls within textile category designation 635 and the **skirt** falls within textile category 642. Based upon international textile trade agreements products of China and Hong Kong are subject to a visa requirement and quota restraints.

The designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes. To obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Patricia Schiazzano at (212) 466-5866.

PAUL K. SCHWARTZ,
Chief, Textiles & Apparel Branch,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:CR:TE 960843 SG
Category: Classification
Tariff No. 6204.13.2010

MS. DONNA BEVER, IMPORT ACCOUNT REP.
AMERICAN SHIPPING COMPANY INC.
140 Sylvan Avenue
Englewood Cliffs, NJ 07632

Re: Reconsideration of NY B86618 dated July 8, 1997; Classification of women's suits with contrasting piping on jackets; suit-type jackets; skirts; Heading 6204; Note 3(a) to Chapter 62, HTSUSA.

DEAR MS. BEVER:

This is in response to your letter dated July 30, 1997, requesting that Customs reconsider New York classification ruling B86618 dated July 8, 1997, issued under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), concerning the classification of a woman's jacket and skirt, style J054. The garments are from China and Hong Kong. NY B86618 was issued to you on behalf of Dress Barn, Inc. You indicate that the two garments (jacket and skirt) are designed and sold to be worn together as a suit. Ruling B86618 classified the garments separately as a skirt and jacket. It is your view that these garments correlate with the classification guidelines for women's suits and should be classified as such. You request that Customs reclassify the garments as a woman's suit.

Facts:

Style J054, which was the subject of NY B86618, consists of a women's woven jacket and skirt which are constructed of matching 70 percent rayon and 30 percent polyester fabric. Both garments are lined. The jacket is constructed from eight panels sewn together lengthwise (four panels in the front, two panels on the side, and two panels in the back). The jacket has long sleeves with two button trim, shoulder pads, a collar, lapels, a full front opening secured by four buttons, two welt pockets at the waist, and two decorative flaps with button trim. The jacket has contrasting colored satin piping around the collar, lapels, front opening, chest flaps and pockets. The skirt features a waistband, back zipper and button closure, side seam pockets, front pleats, and a back vent. The skirt does not contain any of the contrasting colored piping.

In B86618 Customs ruled that the jacket was classified in subheading 6204.39.3010, HTSUSA, while the skirt was classified in subheading 6204.59.3010, HTSUSA.

Issue:

Whether garments that would otherwise be classified as a suit are separately classified due to the addition of contrasting colored piping on the jacket?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's, taken in order.

Legal Note 3(a) to Chapter 62, states, in pertinent part:

> (a) The term "*suit*" means a set of garments composed of two or three pieces made up, in respect of their outer surface, in identical fabric and comprising:
>
> —one suit coat or jacket the outer shell of which, exclusive of sleeves, consists of four or more panels, designed to cover the upper part of the body, possibly with a tailored waistcoat in addition whose front is made from the same fabric as the outer surface of the other components of the set and whose back is made from the same fabric as the lining of the suit coat or jacket; and
>
> —one garment designed to cover the lower part of the body and consisting of trousers, breeches or shorts (other than swimwear), a skirt or a divided skirt, having neither braces nor bibs.

> All of the components of a "suit" must be of the same fabric construction, color, and composition; they must also be of the same style and of corresponding or compatible size. However, these components may have **piping** (a strip of fabric sewn into the seam) in a **different fabric**. [Emphasis added]
>
> * * * * * * *

Note 3(a) was expanded in 1994 to include the paragraph above specifically allowing for piping in a **different fabric** on a suit.

The Explanatory Notes to the Harmonized Commodity Description and Coding System (EN), although not binding, are the official interpretation of the HTSUSA at the international level,. The EN to heading 6204 states that the provisions of the EN to heading 6104 apply, *mutatis mutandis*, to articles of heading 6204. The EN to heading 6104 states that the provisions of the EN to heading 6103 apply, *mutatis mutandis* to the articles of heading 6104.

Although the EN to heading 61.03, which applies to heading 62.04, does not define "different fabric" it does define "identical fabric". It states that:

> For the purposes of Chapter Note 3 (a), the expression "**identical fabric**" means a single identical fabric, i.e., the fabric must be:
>
> —of the **same construction**, i.e., it must be obtained by the same yarn-bonding technique (having the same stitch size) and the structure and measurement (e.g., the decitex number) of the yarns used must also be the same;
>
> —of the **same colour** (even the same shade and pattern of colour); this includes fabrics of different-coloured yarns and printed fabrics;
>
> —of the **same composition**, i.e., the percentage of the textile materials used (e.g., 100 % by weight of wool, 51 % by weight of synthetic fibres, 49 % by weight of cotton) must be the same. [Emphasis added].

In support of your claim for classification as a suit, you argue that the samples contain a number of features which correlate with the classification guidelines for women's suits:

> Two separate pieces consisting of a tailored jacket and skirt designed and sold to be worn together as a "suit".
>
> Identical fabric, style, color, and composition.
>
> Both pieces are fully lined.
>
> The jacket consists of six separate vertical panels. (The sample presented actually has eight vertical panels.)

In addition, you indicate that the jacket's contrasting piping is under ¼ inch in width. It is your understanding that if contrasting colored piping is present on one or more pieces of a style and does not exceed ¼ inch in width, classification under the provision for suits is not precluded. In support thereof you enclose a copy of HQ ruling 084849, dated February 23, 1990, which classified a two piece garment as a suit despite the presence of matching 1/8 inch wide piping on the jacket which was not present on the skirt.

Customs did in fact conclude in HQ 084849, that a jacket and skirt were classifiable as a suit, despite the presence of matching 1/8 inch wide piping on the jacket which was not present on the skirt. We note that the piping in that ruling was the same color as the fabric of the jacket and skirt. In addition, this ruling was issued prior to the note change quoted above, specifically allowing piping. Note 3(a) was expanded in 1994 to specifically allow for different fabric piping on suits.

It is our view that, where the construction, color, or composition of any portion of the components of the "suit" is not identical, the components do not meet the three part criteria for "identical fabric", and therefore are of a "different fabric". Where, as in the instant case the piping is of a different fabric composition than the "suit" components, the piping is in a "different fabric", which is permitted under Note 3(a). Therefore, the jacket and the skirt **do** have an identical construction and composition in accordance with Chapter Note 3(a). Inasmuch as the components are also of the same style and corresponding or compatable size, these garments are properly classifiable as a suit.

Holding:

The jacket and skirt are classified as a suit in subheading 6204.19.2000, HTSUSA, which provides for Women's or girls' suits, ensembles, suit-type jackets, blazers, dresses, skirts, divided skirts, trousers, bib and brace overalls, breeches and shorts (other than swimwear): Suits: Of artificial fibers: Other. The applicable general column one rate of duty is 36.4 cents per kg plus 26.7 percent ad valorem and the textile restraint category is 644.

NY ruling B86618, is hereby revoked.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are a result of the international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories applicable to textile merchandise, you should contact your local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF GLASS AND METAL "PHOTO CUBE" WITH CANDLE AND HOLDER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of a tariff classification ruling letter and the treatment relating to the classification of glass and metal "photo cube" with candle holder and candle.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling, and any treatment previously accorded by Customs to substantially identical transactions, concerning the tariff classification of a "photo cube" consisting of a glass and metal cube, glass candle holder, and candle under the Harmonized Tariff Schedule of the United States (HTSUS). Notice of the proposed revocation was published in Vol. 33, No. 18 of the CUSTOMS BULLETIN dated May 5, 1999.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after August 30, 1999.

FOR FURTHER INFORMATION CONTACT: Paul G. Hegland, General Classification Branch (202) 927–1172.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective.

Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met. Pursuant to Customs obligations, a notice of proposed revocation of New York Ruling (NY) C88496, was published in Vol. 33, No. 18 of the CUSTOMS BULLETIN dated May 5, 1999. No comments were received.

As stated in the proposed notice this revocation action will cover any rulings on this issue which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advised Customs during the notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Customs, pursuant to 19 U.S.C. 1625(c)(1), is revoking NY C88496, and revoking any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) 962090 (*see* "Attachment" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Dated: June 11, 1999.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, June 11, 1999.

CLA–2 RR:CR:GC 962090 PH
Category: Classification
Tariff No. 7013.99.50

PAULA M. CONNELLY, ESQ.
MIDDLETON & SHRULL
44 Mall Road, Suite 208
Burlington, MA 01803–4530

Re: "Photo cube" with votive-style candle; Revocation of NY C88496.

DEAR MS CONNELLY:

This is in reference to your request, on behalf of FETCO International, Inc., dated July 23, 1998, that we reconsider New York Ruling Letter (NY) C88496 issued to you on June 19, 1998, in response to your letter of June 1, 1998, on behalf of FETCO, to the National Commodity Specialist Division in New York, in regard to the classification under the Harmonized Tariff Schedule of the United States (HTSUS) of a "Votive Photo Cube". A sample was provided. We have reconsidered this ruling and now believe it is incorrect. This ruling sets forth the correct classification and the analysis therefor. Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(C)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057 (1993)), notice of proposed revocation of New York Ruling Letter (NY) C88496, was published in the CUSTOMS BULLETIN on May 5, 1999, Vol. 33, No. 18. No comments were received.

Facts:

The merchandise consists of a four-sided glass cube measuring 4 inches in height by 4 inches in width. Each side contains two glass panels, an inner one made of frosted glass and an outer one made of clear glass. The four side are connected by a silver-colored metal frame. Each side has an opening on top which enables a 3″ x 3″ photo to be inserted between the two glass panels. The bottom of the article has a metal lattice-like design with a centered, raised circle of metal over the metal cross-pieces which may be utilized to hold a candle. A two inch glass "votive-style" candle holder with a candle is included with the article. The base of the candle holder fits snugly into the raised circle of metal in the base of the glass cube.

In NY C88496, we held that the article is not a set put up for retail sale and the glass and metal cube, candle holder, and candle must be classified separately. We held the glass and metal cube to be classified in subheading 7013.99.50, HTSUS, as other glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes; the candle holder to be classified in subheading 9405.50.40, HTSUS, as other non-electrical lamps and light fittings; and the candle to be classified in subheading 3406.00.00, HTSUS, as candles, tapers and the like.

You state that all of the components of the article will be imported into the United States together, packaged in a retail box, ready for retail sale. You state that the metal component provides more than half of the value of the article (including the cube, candle holder, and candle), with the glass component (not including the candle holder) providing about 35% of the value. You state that the candle, when lit, illuminates the back of the photographs and does not provide lighting for the surrounding area. You contend that the article is a set put up for retail sale, as described in General Rule of Interpretation (GRI) 3, and that the essential character of the set is provided by the glass cube and that of the glass cube is provided by the metal component.

Issues:

(1) Whether the "photo cube" (without the candle holder and candle) is classifiable as a picture or similar frame of base metal in heading 8306, HTSUS, or glassware of a kind used for indoor decoration or similar purposes in heading 7013, HTSUS.

(2) Whether the "photo cube," consisting of the glass and metal cube, candle holder, and candle, comprise goods put up in sets for retail sale for purposes of GRI 3(b) and, if so, which component of the set provides its essential character.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the GRIs. GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6, taken in order. Under GRI 2(a), any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. Pursuant to GRI 3(b), goods which are *prima facie* classifiable under two or more headings, and which are mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, shall be classified as if they consisted of the material or component which gives them their essential character.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the ENs should always be consulted. See T.D. 89–80, published in the Federal Register August 23, 1989 (54 FR 35127, 35128).

The 1999 HTSUS headings under consideration are as follows:

3406	Candles, tapers and the like
7013	Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018)
8306	Bells, gongs and the like, nonelectric, of base metal; statuettes and other ornaments, of base metal; photograph, picture or similar frames, of base metal; mirrors of base metal; and base metal parts thereof
9405	Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included

EN GRI 3(b)(IX) states that "[f]or purposes of [GRI 3(b)], composite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically inseparable whole * * *." The glass and metal cube is not classifiable under GRI 1 (see below) and the glass and metal components thereof form a practically inseparable whole. The glass and metal cube is a composite good for purposes of GRI 3(b) and is classifiable according to the component which provides its essential character.

EN GRI 3(b)(X) states that:

> For purposes of [GRI 3(b)], the term 'goods put up in sets for retail sale' shall be taken to mean goods which:
>
> (a) consist of at least two different articles which are *prima facie*, clarifiable in different headings * * *;
>
> (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
>
> (c) are put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or on boards).

The glass and metal cube, candle holder, and candle are *prima facie* classifiable in different headings (respectively heading 7013 or 8306, heading 3406, and heading 9405). The articles are put up together to meet a particular need or carry out a specific activity (to display photographs), and, in their condition as imported, are packaged in a retail box, ready for retail sale. We note, in particular, the raised metal circle at the base of the cube which is configured so that the candle holder fits snugly into the center of the base of the cube. Therefore, the glass and metal cube, candle holder, and candle make up "goods put up in sets for retail sale" for purposes of GRI 3(b). The classification of the set is determined by the good of the set which gives it its essential character.

Initially, we will examine the essential character of the glass and metal cube composite good (see, in this regard, EN 83.06(C), indicating, although in a somewhat different context, that composite articles comprised, in part of picture frames of base metal, are to be classified in heading 8306 "when the essential character of the whole is given by the frames"). The term "essential character" is not defined in the HTSUS. According to EN GRI 3(b)(VIII), "[t]he factor which determines essential character will vary as between different kinds of goods[;] [i]t may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods."

Recently, there have been several Court decisions on "essential character" for purposes of GRI 3(b). *Better Home Plastics Corp. v. United States*, 916 F. Supp. 1265 (CIT 1996), *affirmed* 119 F.3d 969 (Fed. Cir. 1997), involved the classification of shower curtain sets, consisting of an outer textile curtain, inner plastic magnetic liner, and plastic hooks. Customs had classified the sets on the basis of the textile curtain under the "default rule of GRI 3(c)", after determining that neither the relative specificity test nor the essential character test was applicable (119 F.3d at 971). The CIT found that the plastic liner performed the indispensable function of keeping water inside the shower and therefore held that the plastic liner imparted the essential character upon the set. In its decision affirming the CIT decision, the CAFC stated:

> The [CIT] carefully considered all of the facts, and, after a reasoned balancing of all the facts, concluded that Better Home Plastics offered sufficient evidence and argument to overcome the presumption of correctness. The court concluded that the indispensable function of keeping water inside the shower along with the protective, privacy and decorative functions of the plastic liner, and the relatively low cost of the sets *all combined* to support the decision that the plastic liner provided the essential character of the sets. [119 F.3d at 971]

Other decisions in which the Court looked primarily to the role of the constituent material in relation to the use of the goods to determine essential character include *Mita Copystar America, Inc. v. United States*, 966 F. Supp. 1245 (CIT 1997), motion for rehearing and reconsideration denied, 994 F. Supp. 393 (CIT 1998), and *Vista International Packaging Co., v. United States*, 19 CIT 868, 890 F. Supp. 1095 (1995).

We believe that the indispensable function of the glass and metal cube is the decorative display of photographs. The glass is the component which is essential for this function. That is, the glass protects and allows the photographs to be viewed, whereas the metal serves the secondary purpose of holding the glass in place. Although the metal provides the form of the cube, the glass is essential to perform the "indispensable function" of the article, displaying photographs.

Of the criteria listed in EN GRI 3(b)(VIII) other than the roles of the constituent materials, bulk, quantity, and weight also support the conclusion that the glass component of the cube imparts its essential character. In regard to the remaining criterion (value), although the cost breakdown you provide indicates a greater cost for the metal component than the glass component, we note that in *Better Home Plastics*, *supra*, even though the relative value of the textile curtain was greater than that of the plastic liner, the plastic liner was held

to impart the essential character (see also Headquarters Ruling Letters (HQs) 086166, dated April 9, 1990, and 952676 dated December 29, 1992, each of which held that the glass component of glass and metal boxes imparted the essential character, notwithstanding that the relative value of the metal component was greater than that of the glass component). We conclude that the glass imparts the essential character to the glass and metal cube.

Insofar as the question of which good provides the essential character in the set consisting of the glass and metal cube, candle holder, and candle is concerned, the criteria for the determination of the essential character of a set are the same as the criteria for determining the essential character of a composite good (see above, and EN GRI 3(b)(VI) through (VII)). After viewing the article with the candle lit, we concur with your conclusion that the candle "merely illuminates the 'photo cube' and provides a special lighting effect [but] does not illuminate the surrounding area." The "indispensable function" of the set remains the decorative display of photographs. As is true of the glass component in the glass and metal cube, the cube in the set is essential for this function, as it protects and allows the photographs to be viewed, whereas the candle and candle holder may support this function by illuminating and providing a special effect for the photographs, but are not essential for it. The essential character of the set is provided by the glass and metal cube composite good, which is classified in heading 7013, pursuant to the essential character analysis above. The set is classified as other glassware of a kind used for indoor decoration or similar purposes in subheading 7013.99.50, HTSUS.

We note that "* * * scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks[,] sold in the * * * shapes [of] tapers, spirals and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax filled containers" from the People's Republic of China and classified in subheading 3406.00.00, HTSUS, are subject to antidumping duties (Notice of Antidumping Duty Order: Petroleum Wax Candles from the People's Republic of China, Case A–570–504, Federal Register of August 28, 1986 (51 F.R. 30686)). The "votive-style" candle in the set would be covered by this antidumping order.

Holdings:

(1) The "photo cube" (without the candle holder and candle) is a composite good for purposes of GRI 3(b); the essential character of the photo cube is provided by the glass component; and it is classified as glassware of a kind used for indoor decoration or similar purposes in heading 7013, HTSUS.

(2) The "photo cube," consisting of the glass and metal cube, candle holder, and candle, packaged in a retail box ready for sale upon importation, comprise goods put up in sets for retail sale for purposes of GRI 3(b); the photo cube provides the essential character of the set; and the set is classified as glassware of a kind used for indoor decoration or similar purposes, other glassware, other, other, other, valued over $0.30 but not over $3 each, in subheading 7013.99.50, HTSUS.

Effect on Other Rulings:

NY C88496 dated June 19, 1998, is revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

MODIFICATION OF RULING LETTERS AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF PARTS FOR AIRCRAFT ENGINES

AGENCY: U. S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letters and treatment relating to classification of parts for aircraft engines.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying three rulings relating to the classification under the Harmonized Tariff Schedule of the United States (HTSUS), of air seals, compressor modules, compressor stator assemblies, and rotor and stator assemblies, all of which are integral components of commercial jet aircraft engines. Similarly, Customs is revoking any treatment it previously accorded to substantially identical transactions.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after August 30, 1999.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Commercial Rulings Division (202) 927–2388.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility**. These concepts are based on the premise that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's rights and responsibilities under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484, Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and declare value on imported merchandise, and to provide other necessary information to enable Customs to properly assess duties, collect accurate statistics and determine whether any other legal requirement is met. Pursuant to Customs obligations, a notice of proposed modification of New York Ruling Letters (NY) C87045, C88225,

and C88226 was published in Vol. 33, No. 18 of the CUSTOMS BULLETIN dated May 5, 1999. No comments were received.

As stated in the proposed notice this modification action will cover any rulings on this issue which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advised Customs during the notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is modifying any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

In *NY* C87045, dated April 29, 1998, the Director of Customs National Commodity Specialist Division, New York, held that a low-pressure compressor module rotor and stator assembly, part 50B500, two low-pressure compressor stator assemblies, parts 50B271 and 56B016–01, and a rotor and stator assembly—LPC module, part 798714, all of which were described as components of commercial jet aircraft engines, were classifiable in subheading 8411.91.1060, HTSUS, as other cast-iron parts of turbojets and turbopropellers for use in civil aircraft. In *NY* C88225, dated May 28, 1998, a high-pressure compressor module rotor and stator assembly, part 56H277, a high-pressure compressor stator set, part 54H891–01, two high-pressure compressor sets, parts 56H489–01 and 54H898–01, and a rotor and stator assembly—HPC module, part 824715, all were classified in the same provision. Finally, in *NY* C88226, dated June 1, 1998, a high-pressure compressor air seal, part 50H021, a diffuser air seal, part 54H846, two high-pressure turbine air seals, parts 50L195 and 50L659, and two low-pressure turbine air seals, parts 50N412 and 50N007, were similarly classified.

These three rulings were based on Customs inadvertent characterization of the parts in issue as being made of cast-iron.

Upon further review of the facts, the merchandise in each ruling has been determined to be of titanium construction, but is otherwise correctly described. As such, pursuant to 19 U.S.C. 1625(c)(1)), Customs is modifying *NY* C87045, *NY* C88225 and *NY* C88226, and any other rulings not specifically identified, to reflect the proper classification of the

merchandise in subheading 8411.91.9080, HTSUS, as indicated in *HQ* 962104. This ruling is set forth as an Attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment it previously accorded to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Dated: June 11, 1999.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, June 11, 1999.

CLA-2 RR:CR:GC 962104 JAS
Category: Classification
Tariff No. 8411.91.9080

MR. PAUL L. ROBERT
PRATT & WHITNEY
400 Main Street
East Hartford, CT 06108

Re: Rotor and Stator Assemblies, Compressor Stator Sets, High-Pressure and Low-Pressure Turbine Air Seals; Parts of Aircraft Turbines; *NY* C87045, *NY* C88225, *NY* C88226 Modified.

DEAR MR. ROBERT:

This is in reference to three rulings previously issued to Pratt & Whitney concerning the classification under the Harmonized Tariff Schedule of the United States (HTSUS) of various parts and components for the PW4000 jet aircraft engine.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L 103–182, 107 Stat. 2057), a notice of proposed modification of New York Ruling Letters (NY) C87045, NY C88225, and NY C88226 were published in the CUSTOMS BULLETIN on May 5, 1999, Vol. 33, No. 18. No comments were received.

In *NY* C87045, dated April 29, 1998, the Director of Customs National Commodity Specialist Division, New York, held that a low-pressure compressor module rotor and stator assembly, part 50B500, two low-pressure compressor stator assemblies, parts 50B271 and 56B016–01, and a rotor and stator assembly—LPC module, part 798714, all of which were described as components of commercial jet aircraft engines, were classifiable in subheading 8411.91.1060, HTSUS, as other cast-iron parts of turbojets and turbopropellers for use in civil aircraft. In *NY* C88225, dated May 28, 1998, a high-pressure compressor module rotor and stator assembly, part 56H277, a high-pressure compressor stator set, part 54H891–01, two high-pressure compressor sets, parts 56H489–01 and 54H898–01, and a rotor and stator assembly—HPC module, part 824715, all were classified in the same provision. Finally, in *NY* C88226, dated June 1, 1998, a high-pressure compressor air seal, part 50H021, a diffuser air seal, part 54H846, two high-pressure turbine air seals, parts 50L195 and 50L659, and two low-pressure turbine air seals, parts 50N412 and 50N007, were similarly classified.

The classifications expressed in these rulings were based on Customs inadvertent reference to the parts as being of cast-iron construction. In fact, they are of titanium construction. The description of these articles in each of the three rulings and their characterization as components of commercial jet aircraft engines is otherwise correct.

The components of the PW4000 jet aircraft engine, the subject of *NY* C87045, dated April 29, 1998, *NY* C88225, dated May 28, 1998, and *NY* C88226, dated June 1, 1998, are provided for in heading 8411, HTSUS, as turbojets, turbopropellers and other gas turbines, and parts thereof. They are classifiable in subheading 8411.91.9080, HTSUS, as other parts of aircraft turbines. The general column 1 rate of duty is free.

NY C87045, *NY* C99225, and *NY* 88226 are modified accordingly. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa Anne Ridgway

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Dominick L. DiCarlo

Nicholas Tsoucalas

R. Kenton Musgrave

Clerk

Raymond F. Burghardt

[PUBLIC VERSION]

(Slip Op. 99–34)

AMERICAN SILICON TECHNOLOGIES, ELKEM METALS CO., GLOBE METALLURGICAL, INC., AND SKW METALS & ALLOYS, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND COMPANHIA BRASILEIRA CARBURETO DE CALCIO, COMPANHIA FERROLIGAS MINAS GERAIS-MINASLIGAS, AND RIMA INDUSTRIAL, S/A, DEFENDANT-INTERVENORS

Consolidated Court No. 97–02–00267

[Plaintiffs and defendant-intervenors move for judgment upon the agency record challenging the final results of the 1994–95 administrative review on silicon metal from Brazil. *Held:* The Court remands the final results with respect to: (1) Minasligas' claimed depreciation; (2) CBCC's interest expenses; (3) CBCC's depreciation expenses; (4) Rima's deferred expenses; (5) Eletrosilex's financial expenses; (6) CBCC's and Rima's cost of internally-produced charcoal; (7) CBCC's supervisory labor costs; (8) CBCC's IPI taxes; (9) Rima's and CBCC's profit ratios; (10) Minasligas' interest income expense; and (11) Minasligas' profit calculation. The Court affirms the final results as to all other issues.]

(Dated April 9, 1999)

Baker & Botts, L.L.P. (William D. Kramer, Martin Schaefermeier, Clifford E. Stevens, Jr., and Courtney Eden) for plaintiffs.

David W. Ogden, Acting Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Randi Rimerman Serota);* of counsel: *Dave Mason,* Attorney Advisor, Office of Chief Counsel, Import Administration, U.S. Department of Commerce for defendant.

Dorsey & Whitney, L.L.P. (Munford Page Hall, III and Philippe M. Bruno) for defendant-intervenors.

OPINION

MUSGRAVE, *Judge:* Plaintiffs, also petitioners in this review, American Silicon Technologies, Elkem Metals Company, Globe Metallurgical, Inc., and SKW Metals & Alloys, Inc. (collectively "American Silicon") and defendant-intervenors, respondents in this review, Companhia Brasileira Carbureto de Calcio, Companhia Ferroligas Minas Gerais-Minas-

ligas, and Rima Industrial S/A (collectively "Minasligas") move for judgment upon the agency record challenging the final results of the 1994–95 administrative review on silicon metal from Brazil. *See Silicon Metal From Brazil; Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke in Part*, 62 Fed. Reg. 1,970 (1997) *("Final Results")*. In response to plaintiffs' motion, defendant, the U.S. Department of Commerce ("Commerce" or "the Department"), agrees to a remand on all issues except for plaintiffs' allegations that Commerce: (1) improperly calculated dumping margins by relying upon sales made during the period of review ("POR") rather than entries; (2) improperly relied upon accelerated depreciation for Minasligas' cost of production ("COP") and constructed value ("CV"); and (3) improperly relied upon a second-tier parent corporation's consolidated financial statements for the calculation of financial expenses.

In response to defendant-intervenors' motion, Commerce agrees to a remand on all issues. Plaintiffs, however, challenge the proposed remand of defendant-intervenors' issues. Plaintiffs argue that Minasligas failed to substantiate its proposed remand issues during the administrative proceedings and should not now be allowed a "second bite at the apple."

I. Background

On August 18, 1997, the Court entered an order remanding this case to Commerce for the correction of ministerial errors identified by the parties. Commerce published amended final results correcting certain ministerial errors on October 17, 1997. Subsequently, on November 5, 1997, plaintiffs and respondent Eletrosilex submitted ministerial error comments with respect to the amended final results. Commerce then issued a redetermination on remand correcting additional ministerial errors on December 15, 1997.

II. Standard of Review

Section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(b)(1) (1995), sets forth the standard of review for antidumping duty administrative reviews. Section 1516a(b)(1) states that "[t]he court shall hold unlawful any determination, finding, or conclusion found * * * to be unsupported by substantial evidence on the record, or otherwise not in accordance with law * * *." 19 U.S.C. § 1516a(b)(1) (1995). "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd*, *Ceramica Regiomontana, S.A. v. United States*, 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987).

III. Discussion

A. Commerce's Reliance Upon Sales Made During the Period of Review

Plaintiffs' first argue that both the plain language and legislative history of 19 U.S.C. § 1675(a)(2)(A) require "the Department to determine the margin of dumping of *each entry* of the subject merchandise during

the POR."[1] Br. in Supp. of Pls.' Mot. for J. Upon the Agency R. at 9 ("Pls.' Br.") (emphasis original). Commerce, however, contends that the statute only requires that dumping margins be *assessed* upon all merchandise entered during the POR and that the "statute is silent * * * with respect to *how to calculate* the duties to be assessed." Def.'s Mem. in Partial Opp'n to Pls.' and Def.-Intervenors' Motions for J. Upon the Agency R. at 11 ("Def.'s Br.") (emphasis original). Commerce also argues that the court's approval of a sales-based approach for exporter's sales price, now constructed export price ("CEP"), margin calculations establishes that a sales-based approach is also permissible for export price ("EP") transactions.[2] *Id.* at 12.

When read in isolation, both § 1675(a)(2)(A) and its legislative history seem to require that Commerce calculate dumping margins based solely upon entries made during the POR. However, in performing its statutory analysis, this Court must also recognize that:

> 'a section of a statute should not be read in isolation from the context of the whole Act, and in fulfilling [its] responsibility in interpreting legislation, [the court] must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy.'

Marcel Watch Co. v. United States, 16 CIT 474, 477, 795 F. Supp. 1199, 1202 (1992) (quoting *Algoma Tube Corp. v. United States*, 9 CIT 418, 422 (1985)); *see also Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) ("'In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'") (quoting *United States v. Heirs of Boisdore*, 8 How. 113, 122 (1849)). And once § 1675(a)(2)(A) is read in the context of the antidumping law as a whole, the Court finds that Congress could not have intended to limit Commerce's margin calculations solely to entries.

As defendant correctly points out, the court has approved Commerce's use of sales during the POR rather than entries during the POR when calculating § 1675(a)(2)(A) antidumping margins. *See Ad Hoc Committee of Southern California Producers of Gray Portland Cement v. United States*, 19 CIT 1398, 1406–08, 914 F. Supp. 535, 544–45 (1995) (*"Portland Cement"*); *NSK Ltd. v. United States*, 17 CIT 590, 595, 825 F. Supp. 315, 320 (1993) *("NSK Ltd.").* In *NSK Ltd.*, the court held that "although Commerce looks at sales to calculate dumping margins,

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[1] 19 U.S.C. § 1675(a)(2)(A) provides that antidumping duties shall be based upon:

> (i) the normal value and export price * * * of *each entry* of the subject merchandise * * *, and
> (ii) the dumping margin for *each such entry*.

19 U.S.C. § 1675(a)(2)(A) (1995) (emphasis added). The legislative history to § 1675(a)(2)(A) provides that:

> the results of the review would include a determination of the foreign market value and the U.S. price of *each entry* of merchandise subject to that order and included within the review, and the amount, if any, by which the foreign market value of *each entry* exceeds the U.S. price of the entry.

S. REP. NO. 96-249, at 79 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 466 (emphasis added).

[2] "Prior to the Uruguay Round Agreements Act, export price ("EP") sales were designated purchase price sales, while constructed export price sales ("CEP") were designated exporter's sales price. 'Notwithstanding the change in terminology, no change [was] intended in the circumstances under which export price versus constructed export price are to be used.'" *Helmerich & Payne, Inc. v. United States*, ___ CIT ___, 24 F. Supp. 2d 304, 308 n.2 (1998) (quoting H.R. REP. NO. 103-826(I), at 79 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 3851).

dumping duties were assessed only upon the entries made during the period of review. Thus, Commerce's methodology for calculating dumping duties in this case is reasonable * * *." *NSK Ltd.*, 17 CIT at 595. The court in *Portland Cement*, relying upon the holding in *NSK Ltd.*, held that when Commerce examines exporter's sales price, now CEP, the Department "may generally calculate a dumping margin based upon all sales made during the period of review." *Portland Cement,* 19 CIT at 1407. The *Portland Cement* Court also held that dumping duties calculated under a sales-based approach must only be assessed upon entries made during the POR. *Id.*

But as plaintiffs point out, both *Portland Cement* and *NSK Ltd.* involved exporter's sales price, now CEP, transactions, not EP transactions such as those currently before this Court. Plaintiffs contend that the court's approval of a sales-based approach in *Portland Cement* and *NSK Ltd.* was based upon the recognition that "[t]here are fundamental differences between cases involving CEP transactions and those involving EP transactions." Reply Br. in Supp. of Pls.' Mot. for J. Upon the Agency R. at 7 ("Pls.' Reply Br."). Plaintiffs also note that "in CEP cases the entry data often are unavailable during the review, rendering it impossible to tie entries to sales." *Id.* With regard to EP transactions, plaintiffs contend that Commerce is generally able to tie entries to sales. Therefore, plaintiffs argue, the justification used by the court to support a sales-based approach for CEP transactions does not exist in EP reviews.

The problem with plaintiffs' argument is that if the Court were to require an entries-based methodology based upon the "plain language" of § 1675(a)(2)(A), Commerce would subsequently be required to utilize an entries-based approach not only for EP transactions, but also CEP transactions. Under a plain language reading of § 1675(a)(2)(A), the term "entry" appears to apply equally and without distinction to both CEP and EP transactions. Any ruling by this Court as to the meaning of the term "entry," as set forth in § 1675(a)(2)(A), would, therefore, also apply equally and without distinction to both CEP and EP margin calculations.[3]

The parties agree that it is oftentimes impossible for Commerce to tie sales to entries for CEP transactions. If Commerce were required to limit its § 1675(a)(2)(A) margin analysis solely to entries made during the POR, Commerce would then be presented with two options, either attempt to perform the impossible or cease calculating dumping margins for CEP transactions. Either result would significantly impede Commerce's ability to effectively enforce the antidumping law and could not have been intended by Congress. Therefore, the Court finds that once § 1675(a)(2)(A) is read in the context of the antidumping law as a whole,

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[3] The "'need for uniformity becomes more imperative where the same word or term is used in different statutory sections that are similar in purpose and content * * *.'" SUTHERLAND STAT. CONST. § 51.02, at 122 (5th Ed) (quoting *Commissioner of Internal Revenue v. Estate of Ridgway*, 291 F.2d 257 (3rd Cir. 1961)).

it becomes apparent that Commerce is not limited to entries made during the period of review when calculating dumping margins.

The Court next turns to plaintiffs' argument that even if a sales-based approach is authorized, Commerce improperly deviated from its established practice of tying sales to entries when calculating margins for EP transactions. The parties agree that it is Commerce's established practice to calculate dumping margins based upon entries made during the POR. The parties also agree that in the administrative review at issue, Commerce departed from this established practice when it relied upon sales made during the POR. What the parties do not agree upon is the validity of Commerce's departure from established practice.

"It is 'a general rule that an agency must either conform itself to its prior decisions or explain the reasons for its departure * * *.'" *Hussey Cooper, Ltd. v. United States*, 17 CIT 993, 997, 834 F. Supp. 413, 418 (1993) (quoting *Citrusuco Paulista, S.A. v. United States*, 12 CIT 1196, 1209, 704 F. Supp. 1075, 1088 (1988)). Commerce is required to explain the reason for its departure to allow the court to "'understand the basis of the agency's action and * * * judge the consistency of that action with the agency's mandate.'" *Crescent Foundry Co. Pvt. Ltd. v. United States*, ____ CIT ____, ____, 951 F. Supp. 252, 261 (1996) (quoting *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808, 93 S.Ct. 2367, 2375, 37 L.Ed.2d 350 (1973)). But "[w]hen the Court finds that an agency has departed from past practice without an adequate explanation for the basis of the departure, the agency's determination must be rejected." *American Silicon Technologies v. United States*, ____ CIT ____, ____, 19 F. Supp. 2d 1121, 1123 (1998).

Commerce agrees that it "normally bases the margin calculation for export price ("EP") sales upon those sales that *entered* the United States during the POR." Def.'s Br. at 13 (emphasis added). Commerce contends, however, that "nothing in the statute or regulations requires this approach, and Commerce retains the discretion to diverge from its normal practice where warranted." *Id.*

Commerce then argues that in this case deviation from established practice was necessary to maintain consistency throughout all administrative reviews of silicon metal from Brazil. "Commerce has found that the use of a sales-based approach may be warranted for EP sales where necessary to achieve consistency with prior reviews." *Id.*

> [B]y applying a consistent methodology in each segment of the proceeding we ensure that we review all sales made during the entire proceeding. Changing the methodology could result in our failure to review some sales. Hence, in these final results of review we have employed the methodology we announced in the final results of the second review.

Id. at 17 (quoting *Silicon Metal From Brazil; Final Results of Antidumping Duty Administrative Review and Determination Not To Re-*

voke in Part, 62 Fed. Reg. 1,970, 1,972 (1997)). In addition, Commerce contends that:

> to change the methodology for one administrative review * * * would result in the exclusion of some sales of subject merchandise and double counting of others in the calculations of dumping margins over the course of the administrative reviews of silicon metal from Brazil. Such a result is contrary to Congress' mandate that dumping margins be as accurate as possible.

Id. at 19.

In reply, plaintiffs challenge Commerce's consistency argument on three grounds. First, "the Government does not identify a single respect in which the underlying facts of this case * * * are any different than those in the universe of cases where the Department has applied its established entry-based methodology." Pls.' Reply Br. at 11. Second, "over the course of this proceeding, the Department has not even consistently followed the distortive sales-based methodology that it advocates." *Id.* And third, Commerce's sales-based approach was distortive from its inception and does not result in a more accurate measure of dumping margins than an entry-based approach. *Id.*

In the final results of first administrative review of silicon metal from Brazil, Commerce applied a sales-based approach to its EP dumping margin analysis. Commerce reasoned that a departure from the established practice of an entry-based approach was necessary because:

> (1) the selling price and each of the expenses associated with this sale were known by Eletrosilex and reported to the Department at an early stage of the review process, and
>
> (2) use of this sale in our margin calculations constitutes the most accurate reflection of Eletrosilex's pricing practices during the period of review.

Def.'s Br. at 15–16 (quoting *Silicon Metal from Brazil; Final Results of Antidumping Duty Administrative Review*, 59 Fed. Reg. 42,806, 42,813 (1994)). Commerce's goal of obtaining the most accurate dumping margins possible is an adequate justification for departing from established practice, especially in light of the court's holding that "fair and accurate determinations are fundamental to the proper administration of our dumping laws." *Koyo Seiko Co., Ltd. v. United States*, 14 CIT 680, 682, 746 F. Supp. 1108, 1110 (1990). And once it has been established that the original departure was reasonable, it would also seem reasonable for Commerce to apply this methodological exception to subsequent administrative reviews for the purpose of "applying a consistent methodology in each segment of the proceeding" to ensure that all sales made during the entire proceeding are reviewed. Def.'s Br. at 17 (quoting *Silicon Metal From Brazil; Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke in Part*, 62 Fed. Reg. 1,970, 1,972 (1997)). The Court, therefore, sustains Commerce's interpretation of § 1675(a)(2)(A) and subsequent reliance upon a sales-based methodology for EP margin calculations.

B. Commerce's Acceptance of Minasligas' Claimed Depreciation

Plaintiffs next argue that Commerce "grossly understated" the monthly amounts of depreciation reported by Minasligas as part of fixed factory overhead because Minasligas reported accelerated depreciation data which was neither: (1) in accordance with Brazilian generally accepted accounting principles ("GAAP"); nor (2) reasonably reflective of actual costs as required by statute. Pls.' Br. at 17, 24.[4] Plaintiffs contend that Minasligas should have depreciated the equipment at issue over a useful life of twenty years rather than the reported depreciation of five years. The effect of a five-year depreciation rate in this case is that no depreciation expenses were included in Commerce's reported fixed factory overhead analysis because the equipment was acquired more than five years before the POR.

In response, Commerce contends that it was reasonable for the Department to rely upon Minasligas' depreciation methodology because that methodology was found to be consistent with Brazilian GAAP. Commerce argues that:

> pursuant to Brazilian GAAP, companies may maintain accounting records and prepare financial statements using the depreciable asset lives suggested by Brazilian tax regulations, as long as the tax-based depreciable lives do not materially distort the results of the company's operations, *i.e.*, the net book value of assets as reported in the company's balance sheet or the depreciation expense as reported in its income statement for the fiscal year.

Def.'s Br. at 31.

While it is true that the court has sustained Commerce's use of accounting methodologies found to be consistent with a home country's GAAP, the court has also held that Commerce must reject GAAP consistent methodologies when they are distortive and do not reflect actual costs. *Thai Pineapple Pub. Co., Ltd. v. United States*, ___ CIT ___, ___, 946 F. Supp. 11, 20 (1996). Upon review of the facts in this case, the Court agrees that even if Minasligas' accelerated depreciation methodology is consistent with Brazilian GAAP, that methodology is also "grossly distortive because it shifts to years prior to the POR almost all of the depreciation attributable to the production of silicon metal during the POR." Pls.' Br. at 25. The Court also agrees that as a result of the accelerated depreciation:

> Minasligas has benefitted and continues to benefit from the use of its principal silicon metal production assets long after the initial five-year period during which Minasligas recorded depreciation based on highly accelerated depreciation rates in its accounting records. This shifting of costs through the use of highly accelerated depreciation violates the fundamental accounting principle, rou-

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[4] In performing its depreciation calculations, Minasligas first relied upon a Brazilian tax regulation which provides that the annual rate of depreciation for an asset may be based upon one half the useful life admitted for the asset acquired as new. Pls.' Br. at 22. Minasligas then applied a second regulation which authorizes further depreciation for assets used in more than one eight hour shift. *Id.*

> tinely recognized by the Department, that costs must be properly matched with revenues.

Id. at 25–26. Therefore, the Court finds that Commerce's use of Minasligas' accelerated depreciation rates was contrary to law. The Court remands this issue with the instruction that Commerce recalculate COP for Minasligas based upon an accounting methodology which is non-distortive and reasonably reflective of actual costs.

C. Commerce's Reliance on the Consolidated Financial Statements of Solvay & Cie

Plaintiffs argue that Commerce's reliance on the consolidated financial statements of Solvay & Cie, the owner of respondent's immediate Brazilian parent corporation, in determining respondent's interest expenses "does not accurately capture the financing costs associated with production of the subject merchandise, [and is] contrary to the language and intent of the statute." *Id.* at 33. In response, Commerce states that it is the Department's established practice to use the consolidated financial statements of a respondent's parent corporation, rather than respondent's financial statements, when the record establishes corporate control by the parent over respondent. Def.'s Br. at 35–36. Commerce, relying upon *Accounting Research Bulletin No. 51, Consolidated Financial Statements*, Committee on Accounting Procedure, American Institute of Certified Public Accountants (August, 1959) *("Bulletin No. 51")*, argues that "majority equity ownership is *prima facie* evidence of control over the subsidiary * * *." *Id.* at 37.[5] And once the *prima facie* case has been made, Commerce contends that the burden then shifts to the party challenging corporate control to demonstrate a lack of corporate control over respondent. *Id.*

This Court finds, however, that *Bulletin No. 51* neither supports nor authorizes Commerce's creation of a bright line evidentiary standard. *Bulletin No. 51* provides that "[t]he *usual condition* for a controlling financial interest is ownership of a majority voting interest, and, therefore, *as a general rule* ownership by one company, directly or indirectly, of over fifty per cent of the outstanding voting shares of another company *is a condition pointing toward* consolidation." *Bulletin No. 51, 51.02* (emphasis added). *Bulletin No. 51* neither states nor implies that "in most circumstances, majority ownership is *prima facie* evidence of corporate control" as defendant alleges. Def.'s Br. 35. Rather, *Bulletin No. 51* holds that evidence of majority equity ownership, while arguably the most important factor to be considered, is still just one "condition pointing toward consolidation." *Bulletin No. 51, 51.02*. Commerce's reliance upon a *prima facie* evidentiary standard is, therefore, without merit and must be rejected. The Court now considers whether there is substantial evidence upon the record to support Commerce's reliance upon the consolidated financial statements of Solvay & Cie.

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[5] The respondent at issue, CBCC, is 99.9 percent owned by Solvay do Brasil, which is in turn 100 percent owned by Solvay & Cie. Based on this ownership arrangement, Commerce determined, for purposes of the Department's interest expense review, that Solvay & Cie was the parent corporation of respondent CBCC.

Commerce notes that its practice of relying upon the consolidated financial statements of a parent corporation is based upon the fact that the controlling entity, "'because of its influential ownership interest, has the power to determine the capital structure of each member company within the group.'" Def.'s Br. at 35 (quoting *Final Determination of Sales at Less Than Fair Value: New Minivans From Japan*, 57 Fed. Reg. 21,937, 21,946 (1992)). If Commerce's primary concern is control by the parent corporation, then it seems to this Court that the immediate parent corporation, in this case Solvay do Brasil, would be much more likely to have and exercise direct control over the subsidiary. This Court's impression is supported by record evidence which confirms financial activity between Solvay do Brasil and CBCC. In contrast, "[t]here is no evidence on the record that Solvay & Cie and Solvay do Brasil engage in similar intercompany transactions and borrowing. * * * To the contrary, the record demonstrates that Solvay & Cie's financial statements are *not* reflective of the actual cost incurred by CBCC to produce and sell silicon metal." Pls.' Br. at 35 (emphasis original). The Court agrees with plaintiffs' observations and, therefore, remands the calculation of CBCC's financial expenses with the instruction that Commerce base those expenses upon the consolidated financial statements of CBCC and its immediate parent Solvay do Brasil.

D. Issues For Which Commerce Agrees Remand Is Appropriate

The Court additionally finds that remand is appropriate for all issues for which Commerce agrees to remand including: (1) recalculation of CBCC's depreciation expense; (2) correction of Rima's COP and CV; (3) recalculation of Eletrosilex's financial expenses; (4) recalculation of COP and CV to accurately reflect CBCC's and Rima's cost of internally-produced charcoal; (5) recalculation of CBCC's COP and CV to include supervisory labor costs; (6) recalculation of CBCC's CV to include IPI taxes; (7) recalculation of CV profit for Rima and CBCC based upon profit ratios determined from non-CBCC financial statements; (8) reconsideration of Minasligas' interest income expense; and (9) recalculation of CV profit for Minasligas.

IV. Conclusion

Therefore, upon reading plaintiffs' and defendant-intervenors' motions for judgment upon the agency record, responses thereto, and upon due consideration of all other papers and proceedings had herein, the Court hereby remands the *Final Results* as to: (1) Minasligas' claimed depreciation; (2) CBCC's interest expenses; (3) CBCC's depreciation expenses; (4) Rima's deferred expenses; (5) Eletrosilex's financial expenses; (6) CBCC's and Rima's cost of internally-produced charcoal; (7) CBCC's supervisory labor costs; (8) CBCC's IPI taxes; (9) Rima's and CBCC's profit ratios; (10) Minasligas' interest income expense; and (11) Minasligas' profit calculation. The Court affirms the *Final Results* as to all other issues.

[PUBLIC VERSION]

(Slip Op. 99–35)

MUKAND, LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND AL TECH SPECIALITY STEEL CORP., CARPENTER TECHNOLOGY CORP., REPUBLIC ENGINEERED STEELS, SLATER STEELS CORP., AND TALLEY METALS TECHNOLOGY, DEFENDANT-INTERVENORS

Court No. 98–04–00925

[Plaintiff moves for judgment upon the agency record challenging the final results of the second administrative review of stainless steel bar from India. Defendant and defendant-intervenors oppose plaintiff's motion. *Held:* The Court affirms the final results.]

(Dated April 9, 1999)

Ablondi, Foster, Sobin & Davidow, p.c. (Peter Koenig) for plaintiff.

David W. Ogden, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Michelle Lynch)* for defendant.

Collier, Shannon, Rill & Scott, PLLC (Laurence J. Lasoff, Robin H. Gilbert, and John M. Herrmann) for defendant-intervenors.

OPINION

MUSGRAVE, *Judge:* Plaintiff, Mukand, Ltd., an Indian producer of stainless steel bar, moves for judgment upon the agency record contesting the final results of the second administrative review of the antidumping duty order on stainless steel bar from India. *See Stainless Steel Bar From India: Final Results of Antidumping Duty Administrative Review*, 63 Fed. Reg. 13,622 (Mar. 20, 1998) *("Final Results")*. Mukand requests that this Court remand the U.S. Department of Commerce's ("Commerce" or "the Department") dumping margin calculation with the instruction that Commerce "recalculate the dumping duty margin without increasing the home market price in the * * * sales [at issue] for an alleged warehouse surcharge." Pl.'s Rule 56.2 Mem. and Mot. for J. on the Agency R. at 6 ("Plaintiff's Br."). Plaintiff argues that Commerce's decision to increase reported prices for the sales at issue to account for a warehouse surcharge is unsupported by substantial evidence. *Id.* at 5.

In response, both defendant, Commerce, and defendant-intervenors, AL Tech Speciality Steel Corp., Carpenter Technology Corp., Republic Engineered Steels, Slater Steels Corp., and Talley Metals Technology (collectively "AL Tech"), domestic producers of the subject merchandise, oppose plaintiff's motion and request that the Court sustain the *Final Results* in their entirety. Commerce and AL Tech contend that: (1) Commerce's determination *was* based upon substantial evidence; and (2) Commerce properly exercised its discretion to disregard Mukand's untimely factual submissions.

BACKGROUND

On February 24, 1997, plaintiff requested an administrative review of the antidumping duty order on stainless steel bar from India. Pursuant

to this request, Commerce initiated the second administrative review on the subject merchandise covering the period February 1, 1996, through January 31, 1997. Plaintiff submitted its first questionnaire response to Commerce on June 4, 1997. In this submission, plaintiff informed Commerce that the enclosed home market sales listing data included a pre-sale warehouse expense, set forth in the data field DISWARH. On September 9, 1997, plaintiff submitted, in response to a supplemental questionnaire, a new home sales market listing. As in the original listing, the September 9 home market sales listing also included a pre-sale warehouse expense, which was again listed in the data field DISWARH.

On September 22, 1997, plaintiff issued another submission to Commerce to correct errors in prior submissions. As part of this September 22 submission, plaintiff stated that in previous representations to Commerce, plaintiff had incorrectly reported that the data field DISWARH contained a pre-sale warehouse expense. Plaintiff explained:

> [[D]ata in th[e] column DISWARH was incorrect, the correct narrative is as under.
>
> We do not incur any consignment or warehousing expenses. The consignment agent incurs all these expenses, which are reimbursed to him as an agency commission fixed as per the agreement. The consignment agent sells the material on our behalf to the customers by charging a price per metric tonne and surcharge towards the consignment expenses. As such, in the column 'GRSUPRH,' we have reported the basic price per unit plus consignment surcharge per unit. The supporting information for this data is the invoice raised to the customer, which is accounted by us.
>
> * * * [W]e have now corrected the data to show zero expenses in all the data files in the column DISWARH. *The original data in this column showed a surcharge amount which is now added to the originally indicated gross unit price.* Accordingly, the new revised gross unit price is indicated in the column GRSUPRH.]

Mukand's Sept. 22, 1997 Submission to Commerce at 4 (emphasis added). "Essentially, [plaintiff] indicated that it mistakenly categorized warehousing as an expense rather than as a part of the gross unit price. To correct this mistake, [plaintiff] stated that, it added the amount incorrectly categorized as a warehousing expense to gross unit price." Mem. of the U.S. in Opp'n to the Pl.'s Mot. for J. Upon the Agency R. at 5 ("Def.'s Br.").

Commerce conducted a verification of plaintiff's questionnaire responses from September 29, 1997 to October 3, 1997. At the start of verification, plaintiff informed Commerce that due to computer programming errors, the warehouse surcharge, first incorrectly reported as a warehouse expense in the DISWARH field, had not been added to the gross unit price reported in the GRUSPRH field.

> As noted in September 22 submission [i]n some of the consignment sales in Home Market an amount was shown in the DISWARH field. This expense was actually not incurred. (All the warehouse expenses are incurred by the Consignment Agent and Mukand's com-

> mission covers those). In fact this was a surcharge applied to the price charged to the customer. As such the correct unit price for these sales, shown in the field 'GRSUPRH' should be corrected to show this additional surcharge. *Essentially, the figures in the DISWARH in the September 9 submission should have been added to the figure in GRUSPRH in the September 22 submission.* We now request correction of these prices and rectification of some data entry errors in these two fields as shown in Annexure 2.

Ex. 1 to the Verification Report of Mukand Ltd. Regarding the Second Administrative Review of Stainless Steel Bar from India (November 20, 1997) ("Verification Exhibit 1") (emphasis added). Plaintiff submitted the corrected data to Commerce on October 8, 1997. The data listed within the October 8 submission for the GRSUPRH field included data which was previously contained in plaintiff's September 9 DISWARH field submission for all reported sales except the sales at issue.

Commerce subsequently learned, during the calculation of the preliminary results, that for some of the sales at issue Commerce had conducted home market sales traces during verification. *See Stainless Steel Bar From India: Preliminary Results of Antidumping Duty Administrative Review and Partial Termination of Administrative Review*, 62 Fed. Reg. 60,482 (November 10, 1997) ("Preliminary Results"). Commerce then determined that for the sales at issue, "including the [sales] examined by Commerce at verification, Mukand had failed to add the amount of the pre-sale warehousing surcharge listed in the DISWARH field of Mukand's September 9, 1997 questionnaire response, to the gross unit home market price." Def.'s Br. at 6. Based upon this determination, Commerce adjusted the reported gross unit price for the sales at issue by adding the data set forth in the September 9 DISWARH field to the gross price listed in the October 8 GRSUPRH field as a warehouse surcharge.

On December 11, 1997, plaintiff submitted a case brief challenging Commerce's decision to add a warehouse surcharge to the sales at issue. Plaintiff argued that:

> for sales on or after November 1, 1996 the * * * per MT warehouse surcharges were *not* separately indicated on the sales invoice. Rather, such warehouse charges were already *included* directly in the price for stainless steel bar reported in the sales invoice. The warehouse surcharge thus did *not* have to be added to the invoice sales prices shown in the field GRSUPRH.
>
> In other words, the prices reported under GRSUPRH for sales on and after November 1, 1996 were already originally correctly reported.

Case Br. of Mukand Commenting On the Prelim. Decision at 3 (December 12, 1997) ("Pl.'s Admin. Case Br.") (emphasis original).

Commerce issued the *Final Results* on March 10, 1998, and, consistent with the *Preliminary Results*, included a warehouse surcharge to the gross unit price for the sales at issue. The *Final Results* concluded that: (1) plaintiff's case brief explained *for the first time* that plaintiff

had changed its invoicing policy for sales after November 1, 1996; (2) plaintiff's case brief comments were inconsistent with plaintiff's representations at verification; and (3) plaintiff's identification of the new invoice policy at such a late stage of the review did not give Commerce the opportunity to analyze and verify plaintiff's new position. *Final Results*, 63 Fed. Reg. at 13,623–24.

Standard of Review

Section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(b)(1) (1995), sets forth the standard of review for antidumping duty administrative reviews. Section 1516a(b)(1) states that "[t]he court shall hold unlawful any determination, finding, or conclusion found * * * to be unsupported by substantial evidence on the record, or otherwise not in accordance with law * * *." 19 U.S.C. § 1516a(b)(1) (1995). "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd*, *Ceramica Regiomontana, S.A. v. United States*, 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987). In performing its substantial evidence analysis, the Court must:

> consider both sides of the record. It is not sufficient to examine merely the evidence that sustains the agency's conclusion. * * * In other words, it is not enough that the evidence supporting the agency decision is 'substantial' when considered by itself. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.

Melex USA, Inc. v. United States, 19 CIT 1130, 1132, 899 F. Supp. 632, 635 (1995) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 478, 488, 71 S.Ct. 456, 459, 464, 95 L.Ed. 456 (1951)).

Discussion

Plaintiff's primary argument is that Commerce's decision to increase reported prices for the sales at issue to account for a warehouse surcharge does not comport with record evidence. Plaintiff argues that based upon Commerce's verification of some of these sales, Commerce should have concluded that there were no warehouse surcharges for these sales. In reply, Commerce and defendant-intervenors contend that: (1) Commerce's decision to increase reported prices for these sales to account for warehouse surcharges was reasonable; and (2) Commerce properly disregarded plaintiff's factual statements on invoicing policy as untimely.

The Court initially determines that Commerce's decision to add warehousing surcharges to the sales at issue when calculating the *Preliminary Results* was reasonable. At the start of verification, plaintiff informed Commerce that "[e]ssentially, the figures in DISWARH in the September 9 submission should have been added to the figure in GRSUPRH in the September 22 submission." Verification Exhibit 1. The language used by plaintiff at this point in the proceeding is instru-

mental because, as defendant-intervenors point out, plaintiff's statements created the impression that warehousing surcharges were incurred for *all* sales listing a value in the DISWARH field. Commerce then verified the sales at issue based upon the assumption that plaintiff would subsequently transfer the data listed in *all* the DISWARH fields to each corresponding GRSUPRH field when plaintiff submitted its corrected post-verification data. However, plaintiff's post-verification submission did not include the transfer of DISWARH data to the GRSUPRH field for the sales at issue. Finding that plaintiff had committed yet another clerical error for these sales, Commerce adjusted reported prices for these sales by adding the warehouse surcharge originally listed in the DISWARH field to the GRSUPRH field. The Court finds that this determination was reasonable and now turns to the reasonableness of Commerce's decision to disregard plaintiff's post-verification case brief statements.

Plaintiff contends that its case brief statements on sales invoice policy, submitted after Commerce's deadline for the submission of factual information, should not be disregarded because the statements are not factual information. Rather, plaintiff claims, the statements are citations to record evidence. Reply Br. of Pl. Mukand to the Opp'n to Pl.'s Mot. for J. on the Agency R. Pursuant to Rule 56.2 at 10 ("Pl.'s Reply Br."). In reply, both defendant and defendant-intervenors argue that plaintiff's sales invoice policy statements are factual information, submitted after Commerce's statutory deadline, and, therefore, properly disregarded by Commerce.

The Court first holds that plaintiff's case brief statements are "factual information" within the meaning of 19 C.F.R. §§ 353.2(g) & 353.31(a)(ii) (1995). *See AL Tech Specialty Steel Corp. v. United States*, ____ CIT ____, Slip Op. 98–136 (September 24, 1998). As set forth in § 353.2(g), factual information includes "statements of fact in support of allegations." 19 C.F.R. § 353.2(g) (1995). Plaintiff's case brief statements fall within this definition. The statements were offered by plaintiff for the sole purpose of supporting plaintiff's allegation that warehouse surcharges were not incurred for the sales at issue. If the Court were to sustain plaintiff's argument, Commerce would subsequently be required to consider any statement submitted by a party to the proceeding, regardless of when the statement was submitted, as long as the statement referred to facts contained within the administrative record at the time of Commerce's factual information deadline. It is obvious to this Court that such a requirement would be absurd. And having found that plaintiff's case brief statements were factual information within the meaning of 19 C.F.R. §§ 353.2(g) & 353.31(a)(ii), the Court must now address whether Commerce's decision to disregard the statements, based upon plaintiff's failure to meet the regulatory deadline, was reasonable.

"In general, this Court has upheld the ITA's rejection of untimely submitted factual information pursuant to 19 C.F.R. § 353.31(a)." *NSK Ltd.*

v. United States, 16 CIT 745, 749, 798 F. Supp. 721, 725 (1992) (citation omitted). As in this case, *NSK Ltd.* involved the submission of factual information at the case brief stage of an antidumping proceeding. The *NSK Ltd.* Court held that "[t]he submission of detailed factual information at the prehearing brief stage of an administrative review is clearly untimely under any circumstances." *NSK Ltd.* at 16 CIT 749–50, 798 F. Supp. 725. This Court has also held that requested factual information must be submitted "within a period that allows Commerce sufficient time for adequate analysis and comment while still meeting statutory deadlines." *Ansaldo Componenti, S.p.A. v. United States*, ____ CIT ____, ____, 628 F. Supp. 198, 205 (1986). In this administrative review, the Court finds that it was incumbent upon plaintiff to create an adequate record to assist Commerce's determinations. *See NSK, Ltd. v. United States*, ____ CIT ____, 919 F. Supp. 442 (1996). For as the court recognized in *Sugiyama Chain Co., Ltd. v. United States*, 16 CIT 526, 530–31, 797 F. Supp. 989, 994 (1992), respondents are in the best position to organize their sales data and submit this information to Commerce in a timely manner.

As a last resort, plaintiff argues that even if the case brief statements are determined to be factual statements within the meaning of §§ 353.2(g) & 353.31(a)(ii), plaintiff should not be penalized for "not having submitted information during verification that [plaintiff] was not then aware it needed to provide." Pl.'s Reply Br. at 11 (referencing *AK Steel Corp. v. United States*, ____ CIT ____, Slip Op. 98–159 (Nov. 23, 1998)). The Court finds, however, that plaintiff should have been aware that a change in invoice policy would be considered requisite factual information subject to verification. Plaintiff's statements leading up to and including verification created the impression that data originally listed in the DISWARH field was a warehouse surcharge that should have been initially listed in the GRSUPRH field for *all* reported sales. If this impression was incorrect, plaintiff was solely responsible for correcting, in a timely manner, the error or misinterpretation it alone had created. The Court finds, therefore, that Commerce's decision to disregard plaintiff's case brief statements was reasonable and based upon substantial evidence. The *Final Results* are affirmed.

CONCLUSION

Therefore, upon reading plaintiff's motion for judgment upon the agency record, defendant, and defendant-intervenors' response thereto, and upon due consideration of all other papers and proceedings had herein, the Court hereby affirms the *Final Results* in their entirety.

[PUBLIC VERSION]

(Slip Op. 99–40)

UNION CAMP CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND DASTECH INTERNATIONAL, INC., ET AL., DEFENDANT-INTERVENORS

Consolidated Court No. 97–03–00483

[Remanded in part.]

(Decided April 29, 1999)

Fenwick & West, LLP (Roger M. Golden and *Phyllis E. Andes)* for Plaintiff.

David Ogden, Acting Assistant Attorney General; *David M. Cohen*, Director; U.S. Department of Justice, Civil Division, Commercial Litigation Branch, *(Lucius B. Lau); Keun Ho Bae*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel, for Defendant.

Williams, Mullen, Christian & Dobbins, P.C., (William E. Perry and *W. David Snead)* for Defendant-Intervenors.

OPINION

I

INTRODUCTION

WALLACH, *Judge:* At issue in this case is the proper surrogate value for octanol–2, a subsidiary product of the sebacic acid production process, that is to be used by the International Trade Administration of the U.S. Department of Commerce ("ITA" or "Commerce") in its first administrative review of antidumping duties on sebacic acid from the People's Republic of China ("PRC"). *See Sebacic Acid from the People's Republic of China; Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 10,530 (1997) *("First Administrative Review")*. This case is before the Court for the second time, following the Court's Memorandum and Order of March 27, 1998, ("Remand Memorandum" and "Remand Order"), directing Commerce, *inter alia*, to "value octanol–2 based on an appropriate cost (which may be the U.S. cost but which may not be based solely on similar molecular structure without any additional evidence) of crude octanol–2, and then recalculate the by-product/co-product determination with the correct value." *Union Camp Corp. v. United States*, 8 F. Supp.2d 842, 853 (CIT 1998). Commerce issued its remand determination on June 25, 1998. *See Remand Determination: Union Camp Corporation v. United States (Consol. Court No. 97–03–00483) ("Remand Determination").* The parties subsequently submitted their respective comments on the *Remand Determination*, and Defendant-Intervenors' submitted a motion asking the Court to reconsider its Remand Order ("Motion To Reconsider").

For the reasons stated herein, the Court agrees with Defendant-Intervenors and finds that its Remand Order was ambiguous, in so far as Commerce interpreted the Remand Order as preventing it from considering record evidence of market prices in valuing the octanol–2 that re-

sults from the sebacic acid production process. Accordingly, the Court grants Defendant-Intervenors' Motion To Reconsider and remands this case for further consideration consistent with this opinion. In doing so, however, the Court takes judicial notice of the fact that in its third administrative review of antidumping duties on sebacic acid from the PRC, Commerce, on the basis of a letter from the editor of the *Chemical Weekly* (India), reversed its previous position and found that the "octanol" quote from this publication did not refer to octanol–1. *See Sebacic Acid From The People's Republic of China; Final Results of Antidumping Duty Administrative Review*, 63 Fed. Reg. 43,373, 43,374–75 (1998) *("Third Administrative Review")*. Having taken judicial notice of this fact, the Court directs Commerce to consider the letter from the editor of the *Chemical Weekly* (India) in choosing an appropriate surrogate value on remand.

Finally, the Court further instructs Commerce that it is to consider whether it should accept new evidence concerning the comparability of 2-ethylhexanol and octanol–2. Should Commerce come to the conclusion that it should accept such evidence, Commerce may do so and, if appropriate, use that evidence as a basis for justifying its use of the *Chemical Weekly* (India) value for "octanol" as a surrogate value.

II

BACKGROUND

The relevant facts of this case are described in *Union Camp Corp. v. United States*, 8 F. Supp.2d 842 (CIT 1998), and familiarity with them is presumed. Only the facts relevant to the disposition of Defendant-Intervenors' Motion To Reconsider are repeated.

On March 7, 1997, Commerce issued its *First Administrative Review*, covering shipments of sebacic acid from the PRC to the United States during the period July 13, 1994, through June 30, 1995. *First Administrative Review*, 62 Fed. Reg. at 10,530. Because the PRC is a nonmarket economy, Commerce determined the "normal value" of the sebacic acid using a constructed value pursuant to 19 U.S.C. § 1677b(c)(1) (1994), which provides that, where appropriate, Commerce "shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise." In valuing the factors of production, Commerce is to use, where possible, "prices or costs * * * in one or more market economy countries" that are at a comparable level of economic development and that are "significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4) (1994)

For the *First Administrative Review*, Commerce used surrogate values from India to construct the normal value of the sebacic acid. *See First Administrative Review*, 62 Fed. Reg. at 10,533. In doing so, Commerce used a published price for "octanol" from the *Chemical Weekly* (India) to value the octanol–2 that is produced, as a subsidiary product, through the sebacic acid production process. *See id.* at 10,534–35. Although the "octanol" quote from the *Chemical Weekly* (India) does not make clear whether it refers to octanol–2 or another type of octanol,

Commerce assumed that this price was for octanol–1 and concluded that octanol–1 was a comparable product to octanol–2. *See id.* at 10,534. Commerce's only explanation as to how the two products were comparable, however, was that they have similar molecular formulae. *See id.*

Before this Court, Plaintiff challenged Commerce's conclusion concerning the comparability of octanol–1 and octanol–2, arguing that the decision was not supported by substantial evidence on the record and not otherwise in accordance with law. *See* Brief In Support Of Union Camp Corporation's Rule 56.2 Motion For Judgment Upon The Agency Record, dated September 5, 1997, at 19–21. On March 27, 1998, the Court agreed with Plaintiff and found that Commerce's interpretation of the word "comparable" in 19 U.S.C. § 1677b(c)(4) (1994), to mean similar molecular structure, was not a reasonable interpretation of the statute. *Union Camp*, 8 F. Supp.2d at 849. The Court stated that Commerce "must either provide an explanation for how octanol–1 is comparable to octanol–2 based on some acceptable standard [value or use] or it must offer a reasonable explanation of why it is changing its legal standard for such determinations." *Id.* In regard to Commerce's conclusion also being unsupported by substantial evidence, the Court stated:

> Commerce discussed its reason for selecting the Indian value of octanol–2, *i.e.*, the similar molecular formulae. It also discussed why it rejected Union Camp's internal cost of octanol–2 based on Commerce's preference for public, published information. Commerce failed to discuss, or apparently consider, however, the U.S. value of octanol–2 placed on the record by Dastech or Union Camp's submission regarding an adjustment of that U.S. value to reflect that Dastech 's submission reflected the value of refined octanol–2. * * * Thus, Commerce's failure here to consider the other surrogate values placed on the record results in its valuation of octanol–2 using the Indian value of octanol–1 being unsupported by substantial evidence on the record.

Id. at 850 (citation omitted).

In light of these findings, the Court remanded this case to Commerce with the following instructions:

> [I]t is hereby * * * ORDERED ADJUDGED AND DECREED that this case is remanded to [Commerce] with instructions to value octanol–2 based on an appropriate cost (which may be the U.S. cost but which may not be based solely on similar molecular structure without any additional evidence) of crude octanol–2, and then recalculate the by-product/co-product determination with the correct value * * *.

Id. at 853.

On June 25, 1998, Commerce issued its *Remand Determination*, in which it used Union Camp's internal cost for crude octanol–2 as a surrogate for the octanol–2 produced by Defendant-Intervenors. *Remand Determination* at 3, 9–10. Even though Commerce identified and discussed additional record evidence that supported its use of the *Chemical Weekly* (India) value of refined octanol—and commented that this value "is the

best available information to effectuate the Department's goal of determining the most accurate margin possible," *Remand Determination* at 6—it nevertheless stated that it felt constrained by the Court's Remand Order from using or considering other possible surrogate values that were on the record. Commerce stated that:

> The Department is using the U.S. cost of crude octanol–2 to recalculate the dumping margins because the court instructed us to value octanol–2 based on an appropriate "cost" of crude octanol–2 and the only value on the record for "cost" of crude octanol–2 is the petitioner's U.S. cost of crude octanol–2. The Department's use of such a value necessitates a recalculation of the dumping margins. However, the Department has also identified for the court additional record evidence that octanol–1 and octanol–2 are comparable in use. It remains the Department's position, as reflected in the determination on remand, that using the petitioner's U.S. cost of crude octanol–2 is inappropriate because it results in less accurate dumping margins.

Remand Determination at 10. *See also* Defendant's Response To The Comments Filed By Union Camp And Dastech Regarding The Remand Determination Filed by The Department of Commerce ("Defendant's Response") at 3 ("Commerce did not utilize the data contained in *Chemical Weekly* (India) because this Court's remand order specifically instructed the agency to 'value octanol–2 based on an appropriate cost * * *.'"). In so finding, Commerce again did not consider the U.S. prices from the *Chemical Marketing Reporter* (U.S.) for octanol–2 that were placed on the record by Defendant-Intervenors. Presumably, Commerce concluded that, as the value reported in the *Chemical Marketing Reporter* (U.S.) reflects a market *price* for refined octanol–2, it was precluded from considering this figure by the Court's Remand Order. *See Remand Determination* at 3, 8–10.[1] In addition, although Commerce reasserted its position that the *Chemical Weekly* (India) value for "octanol" is the "best available information," it also did not identify any record evidence on remand to confirm exactly what product (octanol–1, octanol–2 or some other product) was being referenced by this figure. *See Remand Determination* at 6 ("[G]iven that the *Chemical Weekly* (India) does not specify a particular type of octanol, we believe that evidence on the record suggests that the refined octanol price listed in the *Chemical Weekly* (India) is a reasonable surrogate value for octanol–2.")

Using Union Camp's internal cost of crude octanol–2 (10.372 Indian rupees per kg/$0.15 per lb) as the surrogate, Commerce concluded that octanol–2 is a by-product of the sebacic acid production process, "because the overall value of octanol–2 is insignificant relative to the value of sebacic acid and the other subsidiary products." *Remand Determina-*

[1] The only direct discussion of the *Chemical Marketing Reporter* (U.S.) values occurs on pages 8 and 9 of the *Remand Determination*, where Commerce discussed Defendant-Intervenors' contention that the 36 percent price difference between the octanol–1 and octanol–2 values in the *Chemical Marketing Reporter* (U.S.) would reflect a similar price difference in the Indian market. In response to this observation, Commerce simply reiterated that although it believed the *Chemical Weekly* (India) value to be the most appropriate surrogate, it was nevertheless using Union Camp's cost information to value octanol–2 "in accordance with the Court's instructions." *Remand Determination* at 9.

tion at 4. In so finding, Commerce reversed its previous conclusion that, based on the *Chemical Weekly* (India) value for octanol–1 of 76 Indian rupees per kg, octanol–2 should be treated as a co-product for cost accounting purposes. *See First Administrative Review*, 62 Fed. Reg. at 10,533–35; *Sebacic Acid from the People's Republic of China; Preliminary Results of Antidumping Duty Administrative Review ("Preliminary Results")*, 61 Fed. Reg. 46,440, 46,443 (1996).[2]

Because Commerce claimed that the language of the Court's Remand Order inappropriately constrained its consideration of appropriate surrogate values, on July 27, 1998, Defendant-Intervenors submitted a motion asking this Court to reconsider its Remand Order. According to Defendant-Intervenors, because either the Remand Order or Commerce's reading of the Remand Order was "manifestly erroneous," "[Commerce] has issued an unfair and inaccurate determination which is directly contrary to the statute, the legislative history, prior court cases and generally accepted accounting principles." Defendant-Intervenors' Comments On The Commerce Department's Remand Determination And Memorandum In Support Of Motion For Reconsideration ("Reconsideration Memorandum") at 1, 33. In response, Plaintiff asserts that Defendant-Intervenors' argument that a *refined* octanol value can be an appropriate surrogate is untimely, that Union Camp has not manipulated its price of crude octanol–2, that Union Camp's cost of crude octanol–2 is fair, that use of certain statements concerning the comparability of octanol–1 and octanol–2 are unreliable, and that deference to Commerce supports sustaining the *Remand Determination*. Plaintiff Union Camp Corporation's Rebuttal Comments And Response In Opposition To Defendant-Intervenors' Motion For Reconsideration ("Plaintiff's Response") at 3–6. Plaintiff also argues that Defendant-Intervenors' Motion For Reconsideration is untimely under USCIT R.59 and that Defendant-Intervenors have failed to state any substantive grounds under USCIT Rs.59 and 60 that would justify granting the Motion For Reconsideration. *Id.* at 7–13.

For its part, Defendant says that, "[a]s is apparent from the Remand Determination, Commerce carefully examined this Court's remand order, concluded that the Court's use of the word 'cost' was deliberate, and, as a result, valued octanol–2 based upon the 'cost' of crude octanol–2." Defendant's Response at 2. Since Commerce complied with the Court's Remand Order, Defendant argues, "the Court should sustain the remand results, enter final judgment, and dismiss the action." *Id.*

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[2] To determine the correct accounting treatment of a subsidiary product, Commerce examines, in accordance with generally accepted accounting principles (GAAP), whether the value of a subsidiary product is significant or insignificant relative to the other products that result from a particular production process. *See Remand Determination* at 3–4; *Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Sebacic Acid From the People's Republic of China*, 59 Fed. Reg. 565, 569 (1994) ("By-products are identified by their relatively insignificant sales value, whereas [co-products] * * * generally have significant sales value relative to the product under investigation."); *Elemental Sulphur From Canada; Final Results of Antidumping Finding Administrative Review*, 61 Fed. Reg. 8,239, 8,241–42 (1996) (identifying several factors Commerce examines to determine the relative significance of a particular subsidiary product). For calculating normal value, Commerce subtracts the sales revenues of by-products from the production costs of the main product. *See Preliminary Results*, 61 Fed. Reg. at 46,443. In contrast, if Commerce determines that a subsidiary product is a co-product, it will allocate production costs between the main product and the co-product. *See id.*

Defendant also notes, however, that Commerce "would be willing to undergo another remand so that it may utilize the *Chemical Weekly* (India) price." *Id.* at 4.

Independent from, and subsequent to, Commerce's *First Administrative Review* and the *Remand Determination*, on August 13, 1998, Commerce published the final results of its *Third Administrative Review*, covering the period July 1, 1996, through June 30, 1997. *Third Administrative Review*, 63 Fed. Reg. at 43,373. In that review, the respondents submitted a letter written by the editor of the *Chemical Weekly* (India) stating that the "octanol" value in the *Chemical Weekly* (India) refers to 2–ethylhexanol. *Id.* at 43,374. Though apparently a type of octanol, 2–ethylhexanol appears to be a distinct product from octanol–1 and octanol–2. *Id.* at 43,374–75. Based on this letter and other record evidence concerning similar uses, Commerce concluded that 2–ethylhexanol and 2–octanol are comparable merchandise and, accordingly, found that the *Chemical Weekly* (India) price for "octanol" is the most appropriate surrogate for valuing octanol–2. *Id.* at 43,375.

III

DISCUSSION

A

Standard of Review

The Court "shall hold unlawful any determination, finding, or conclusion found * * * to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994). Substantial evidence is something more than a "mere scintilla," and must be enough evidence to reasonably support a conclusion. *Primary Steel, Inc. v. United States*, 17 CIT 1080, 1085, 834 F. Supp. 1374, 1380 (1993) (quoting *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd.*, 810 F.2d 1137 (Fed. Cir. 1987)). "As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A.*, 10 CIT at 404–5, 636 F. Supp. at 966.

In reviewing an agency's construction of the statute that the agency administers, the Court's initial inquiry is to determine "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Id.* at 843–44. Consequently, "[t]he court will defer to the agency's construction of the statute as a permissible construction if it 'reflects a plausible construction of the plain language of the statute[s] and does not otherwise conflict with

Congress' express intent.'" *Torrington Co. v. United States*, 82 F.3d 1039, 1044 (Fed. Cir. 1996) (citing *Rust v. Sullivan*, 500 U.S. 173, 184 (1991)).

B

THE COURT GRANTS DEFENDANT-INTERVENORS' MOTION FOR RECONSIDERATION.

1

THE COURT CONSIDERS DEFENDANT-INTERVENORS' MOTION FOR RECONSIDERATION UNDER USCIT R. 59.

Although, on its face, USCIT R. 59 provides only for "[a] new trial or rehearing * * * in an action tried without a jury or in an action finally determined," it has been well-recognized that the concept of a new trial under this Rule is broad enough to cover a rehearing of any matter decided by the Court. *Nat'l Corn Growers Ass'n v. Baker*, 9 CIT 571, 584, 623 F. Supp. 1262, 1274 (1985), *rev'd on other grounds* 840 F.2d 1547 (Fed. Cir. 1988) (quoting *Timken Co. v. United States*, 6 CIT 76, 76, 569 F. Supp. 65, 67 (1983), (quoting 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2804 at 35 (1973))). Accordingly, the Court will consider Defendant-Intervenors' Motion For Reconsideration in light of USCIT R. 59.

As this Court has previously noted, the grant of a motion for reconsideration is within the sound discretion of the Court. *Union Camp v. United States*, 963 F. Supp. 1212, 1213 (1997) (citing *Kerr-McGee Chem. Corp. v. United States*, 14 CIT 582, 583 (1990)). "The purpose of a rehearing is not to relitigate a case," but to rectify a significant flaw in the conduct of the original proceedings. *Kerr-McGee*, 14 CIT at 583 (citations omitted). Although specific grounds upon which a court may grant such a motion are not listed in the Rule, it is well established that a motion for reconsideration should be granted, and the underlying judgment or order modified, when a movant demonstrated that the judgment is based on manifest errors of law or fact. *See* 11 Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice and Procedure* § 2810.1 at 125 (2nd ed. 1995) ("[T]he movant may demonstrate that the motion is necessary to correct manifest errors of law or fact upon which the judgment is based.")

While a motion for reconsideration is to be considered under the standards of USCIT R.59, it is clear that, in this instance, the time limit set out in USCIT R. 59(b) does not prevent this Court from properly considering Defendant-Intervenors' Motion For Reconsideration. Under USCIT R. 59(b), "[a] motion for a new trial or rehearing shall be served and filed not later than 30 days after the entry of judgment or order." Citing this Rule, Plaintiff argues that this Court lacks jurisdiction to hear Defendant-Intervenors' Motion For Reconsideration, since it was filed on July 27, 1998—121 days after the Remand Order was entered and 91 days after the 30 day time limit expired. Plaintiff's Response at 6–7.

Contrary to Plaintiff's claim, however, the 30 day time limit of USCIT R. 59(b) does not render this Court without jurisdiction to hear the Motion For Reconsideration. As this Court and others have held, the time limit set out in USCIT R. 59(b) and the corresponding rule of federal civil procedure, Fed. R. Civ. P. 59(b),[3] only apply to final judgments or orders. *See Timken*, 6 CIT at 78, 569 F. Supp. at 68; *Bohack Corp. v. Iowa Beef Processors, Inc.*, 715 F.2d 703, 712 n.10 (2d Cir. 1983); *Warner v. Rossignol*, 513 F.2d 678, 684 n.3 (1st Cir. 1975); *Manos v. Trans World Airlines, Inc.*, 324 F. Supp. 470, 488 (N.D. Ill. 1971); *Graci v. United States*, 301 F. Supp. 947, 950 (E.D. La. 1969), *aff'd* 456 F.2d 20 (5th Cir. 1971). *Cf. Garrett v. Blanton*, 1993 WL 17697, at * 3 (E.D. La. 1993) (holding that "an interlocutory judgment on liability issues is not a 'judgment' for purposes of [Fed. R. Civ. P] 59"); *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340, 353–54 (3d Cir. 1981) (finding that a judgment for purposes of Fed. R. Civ. P 50(b) is not final until attorney's fees have been determined). In contrast, a motion for reconsideration of an interlocutory order "is proper at any time prior to the final determination of the merits." *Timken*, 6 CIT at 78, 569 F. Supp. at 68 (quoting *Graci*, 301 F. Supp. at 950). As explained by Wright, Miller and Kane:

> The reason for a short time limit on motions for a new trial is to promote finality of judgments. That policy is not applicable to an interlocutory order, which by hypothesis is not final and is subject to modification by the court at any time before judgment is entered. Thus, it has been held that the time limits of Rule 59 do not apply to a motion seeking a new trial in connection with an interlocutory judgment.

Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice and Procedure* § 2812 at 143 (2d ed. 1995)

There is no debate as to the interlocutory nature of the Court's Remand Order. As the Federal Circuit has made clear, as a general rule "an order remanding a matter to an administrative agency for further findings and proceedings is not final." *Cabot Corp. v. United States*, 788 F.2d 1539, 1542 (Fed. Cir. 1986) (remand to Commerce is not an appealable final judgment); *accord Badger-Powhatan, A Division Of Figgie Int'l, Inc. v. United States*, 808 F.2d 823, 825 (Fed. Cir. 1986); *Jeannette Sheet Glass Corp. v. United States*, 803 F.2d 1576 (Fed. Cir. 1986). While it is true that "remands are not all of the same nature" and that a remand can be considered a final judgment in certain circumstances, *Travelstead v. Derwinski*, 978 F.2d 1244, 1249 (Fed. Cir. 1992), nothing in the nature or terms of the Court's Remand Order made this a final judgment. According to the terms of the Remand Order, after Commerce complied with the Court's instructions, the parties were allowed to submit to the Court both initial and rebuttal comments on Commerce's *Remand Determination*. *See Union Camp*, 8 F. Supp.2d at 853. Further,

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[3] USCIT R. 59(b) provides for a 30–day period within which to move for a new trial or rehearing. In contrast, Fed. R. Civ. P. 59(b) provides only for a 10–day period. The lengthier period is required by 28 U.S.C. § 2646 (1994), a statute only applicable to the Court of International Trade.

upon reviewing these comments, this Court retained the discretion to either remand this case for yet further consideration by Commerce or affirm the *Remand Determination*. Given these facts, the Court's Remand Order is interlocutory and, as such, is subject to modification by the Court notwithstanding the 30 day time limit of USCIT R. 59(b).[4]

2

ON REMAND, COMMERCE MAY USE AN APPROPRIATE "COST," "VALUE" OR "PRICE" FOR OCTANOL–2 IN MAKING ITS BY-PRODUCT/CO-PRODUCT DETERMINATION.

As noted earlier, in the initial Remand Order the Court instructed Commerce, "to value octanol–2 based on an appropriate *cost* * * * of crude octanol–2." *Union Camp*, 8 F. Supp.2d at 853 (emphasis added). In its Reconsideration Memorandum, Defendant-Intervenors essentially argue that the Court's use of the word "cost" was manifestly erroneous, since it allowed Commerce to claim it had to rely on Union Camp's internal, unverified cost for crude octanol–2 (the only "cost" value on the record) and ignore other, more appropriate, surrogate values that were on the record. *See* Reconsideration Memorandum at 31–33, 36–38.

The Court grants Defendant-Intervenors' Motion For Reconsideration. In its Remand Memorandum of March 27, 1998, the Court stated that one reason the *First Administrative Review* was unsupported by substantial evidence was the fact that Commerce "failed to discuss, or apparently consider," the *Chemical Marketing Reporter* (U.S.) value for octanol–2 put on the record by Defendant-Intervenors. *Union Camp*, 8 F. Supp.2d at 850. Since the *Chemical Marketing Reporter* (U.S.) value for octanol–2 was a market *price* for refined octanol, the obvious implication of this finding was that Commerce could — and, in fact, must — consider both "costs" and "prices" on the record in selecting an appropriate surrogate value for octanol–2. Similarly, the implication of the Court's holding that Commerce's use of the *Chemical Weekly* (India) price for "octanol" was unsupported by substantial evidence is that, should substantial evidence be identified on remand, Commerce could use this market *price* for octanol on remand.

Despite the obvious implication of these findings, however, the Court's actual Remand Order of March 27, 1998, stated that Commerce "was to value octanol–2 based on an appropriate *cost* * * * of crude octanol–2." *Union Camp*, 8 F. Supp.2d at 853 (emphasis added). Simply put, this Order was ambiguous. As specifically provided by statute, in valuing the factors of production for constructing the "normal value" of merchandise in a non-market economy, Commerce "shall utilize, to the extent possible, the *prices or costs* of factors of production" in a comparable market economy. 19 U.S.C. § 1677b(c)(4) (1994) (emphasis added).

[4] In footnote 2 of its Response, Plaintiff notes that, "[w]hether the Order is a 'final judgment' or not is irrelevant to application of USCIT R.59. The rule is not restricted to *final* judgments or orders but applies to any judgments or orders." Plaintiff's Response at 7 n.2 (citation omitted). As the discussion above makes clear, this assertion is simply incorrect. Because the authority cited by Plaintiff (*Belfont Sales Corp. v. United States*, 12 CIT 916, 698 F. Supp. 916 (1988), *aff'd* 878 F.2d 1413 (Fed. Cir. 1989)), Plaintiff's Response at 7, involved a *final* order in a classification case, the case is inapposite to the facts at bar.

In this case, two market prices for octanol were placed on record by the parties and, in accordance with 19 U.S.C. § 1677b(c)(4) (1994), should have been evaluated along with Union Camp's internal "cost" of crude octanol–2 as possible surrogate values. Commerce, however, chose to view the Court's use of the word "cost" in a restrictive manner, and concluded that the Court's use of this term limited its ability to consider market prices on remand. In so doing, Commerce rendered the Remand Order legally erroneous, since its interpretation led the Remand Order to directly conflict with, and limit, Commerce's statutory discretion to consider prices.

Further, and again based on Commerce's restrictive interpretation, it appears that the Court's use of the word "cost" may have prevented Commerce from using the "best available information" in determining normal value for the sebacic acid. As required by 19 U.S.C. § 1677b(c)(1) (1994), in determining normal value in a non-market economy, "the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy * * *." The purpose of such a requirement, of course, is to achieve the most accurate dumping margins possible. *See Tianjin Mach. Import & Export Corp. v. United States*, 16 CIT 931, 940, 806 F. Supp. 1008, 1018 (1992) ("Commerce's ability to construct foreign market value from weighted alternatives advantageously serves the antidumping statute's purpose of 'determining current margins as accurately as possible.'"). As Commerce notes in its *Remand Determination*, however, Union Camp's internal cost for crude octanol–2 is not the "best available information":

> The Department believes that a more accurate margin results if subsidiary products, such as octanol–2, are valued using publicly available information reflecting actual market **prices** rather than the petitioner's internal **cost**. Thus, the Department uses publicly available market prices whenever possible, because they are more predictable and reliable. Publicly available values reflect actual transactions between buyers and sellers and therefore are a more accurate reflection of the market value of a subsidiary product. Internal cost values, particularly those of a party in the current segment of a proceeding may be less reliable and subject to manipulation. Moreover, in the present case, the petitioner's internal cost information for crude octanol–2 is unverified.

Remand Determination at 4; *see also id.* at 6 ("[T]he Department maintains that the value for refined octanol from *The Chemical Weekly* (India) is the best available information to effectuate the Department's goal of determining the most accurate margin possible.")

Finally, Commerce's interpretation appears to place the Remand Order in conflict with *Asociacion Colombiana de Exportadores de Flores v. United States*, 6 F. Supp.2d 865 (CIT 1998) and *Asociacion Colombiana de Exportadores de Flores v. United States*, 13 CIT 13, 704 F. Supp. 1114 (1989), *aff'd* 901 F.2d 1089 (Fed. Cir. 1990). In both these cases, this Court accepted Commerce's methodology, which used GAAP, of (a) using

market values to help determine whether a subsidiary product is a by-product or a co-product; and (b) after determining that the subsidiary products were by-products, offsetting the total cost of production with revenues earned from the sale of these by-products. *See Asociacion Colombiana*, 6 F. Supp.2d at 881–82; *Asociacion Colombiana*, 13 CIT at 26, 704 F. Supp. at 1125; *see also IPSCO, Inc. v. United States*, 12 CIT 384, 388–89, 687 F. Supp. 633, 636–37 (1988), *rev'd on other grounds* 956 F.2d 1056 (Fed. Cir. 1992)[5] (citing various ITA investigations that looked to relative sales value as a factor in determining whether a product is a by-product or co-product). Because there appear to be no material facts which would distinguish, and make Commerce's methodology inappropriate for, the facts at bar, limiting Commerce's ability to consider market prices would constitute a repudiation of Commerce's GAAP-based methodology and the opinions of this Court which have approved it. That was not even hinted at in the Court's Remand Memorandum. The methodology to be employed by Commerce in determining whether octanol–2 should be treated as a by-product or a co-product for cost accounting purposes was not an issue that was before this Court.

In short, the Court's limiting use of the word "cost" in its initial Remand Order was ambiguous and, accordingly, subject to an interpretation that would constitute an error of law preventing Commerce from considering potentially appropriate price data in determining Defendant-Intervenors' dumping margins. Rather than seeking to clarify the apparent ambiguity, however, Commerce chose to interpret it in a fashion designed to render its decision erroneous. For this reason, the Court remands this case to Commerce with instructions that it value the octanol–2 that results from the sebacic acid production process based on an appropriate surrogate *value* for this product, and then recalculate the by-product/co-product determination with this correct value. This surrogate value may be a an appropriate foreign or U.S. *cost* or *price* for comparable merchandise. As noted in the Court's Remand Memorandum and Remand Order, however, Commerce may not determine that a particular product is "comparable merchandise" for purposes 19 U.S.C. § 1677b (1994) based solely on a finding of similar molecular structure. *See Union Camp*, 8 F. Supp.2d at 849, 853.

On this point, it should be stressed that no value Commerce chooses as a surrogate will be deemed supported by substantial evidence until Commerce considers the *Chemical Marketing Reporter* (U.S.) value for octanol–2 put on the record by Defendant-Intervenors and either (a) adopts it as a surrogate value, or (b) explains why it is rejecting it for these purposes. As the Court specifically noted in its Remand Memorandum, in regard to Commerce's initial failure to consider this value,

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[5] *Ipsco, Inc. v. United States*, 965 F.2d 1056 (Fed. Cir. 1992), reversed the trial court's subsequent determination (at 13 CIT 402 (1989)) that Commerce should take sales values into account in allocating sales between co-products. In *Asociacion Colombiana*, this Court made clear that this holding should not be read as limiting Commerce's discretion to use market values, or prices, in determining the proper cost accounting treatment for subsidiary products. *See Asociacion Colombiana*, 6 F. Supp.2d at 881 ("IPSCO does not, however, as HOSA maintains, limit Commerce's discretion to use value to distinguish between by-products and co-products."); *accord E.I. DuPont De Nemours & Co., Inc. v. United States*, 932 F. Supp. 296, 302 (1996).

"Commerce's failure here to consider the other surrogate values placed on the record results in its valuation of octanol–2 using the Indian value of octanol–1 being unsupported by substantial evidence on the record." *Id.* at 450; *see also Olympia Industrial, Inc. v. United States*, 7 F. Supp.2d 997, 1001 (CIT 1998) ("Commerce has an obligation to review all data and then determine what constitutes the best information available or, alternatively, to explain why a particular data set is not methodologically reliable."). Accordingly, the Court further orders Commerce, in seeking the best available information to use as a surrogate, to *specifically consider and address* all alternative surrogate values that have been placed on the record—including the *Chemical Marketing Reporter* (U.S.) Value for Octanol–2.[6]

3

IF APPROPRIATE, ON REMAND COMMERCE MAY USE AN UNADJUSTED VALUE FOR "REFINED" OCTANOL AS A SURROGATE FOR THE OCTANOL–2 PRODUCED BY DEFENDANT-INTERVENORS.

An additional issue raised by the *Remand Determination* is whether Commerce may use a value for refined octanol, without adjustment, as a surrogate for the octanol–2 produced by Defendant-Intervenors. In its Remand Determination, Commerce stated:

> The sebacic acid factors of production used to calculate normal value ("NV") already incorporate the relatively few factors of production (labor and energy) necessary to refine crude octanol–2. Production of sebacic acid results in the production of crude octanol–2 as a subsidiary product. Given that the sebacic acid factors of production already include the factors used to refine octanol–2, a more accurate by-product/co-product analysis results by using the refined value of octanol–2. There is no need to take a refined value of octanol–2 and then adjust it to derive a value for crude octanol–2. Moreover, there is a publicly published sales price on which we can base a value for refined octanol–2.

Remand Determination at 5.

On the basis of this logic, Defendant-Intervenors argue extensively that Commerce erred in its *Remand Determination* in using Union Camp's internal cost for *crude* octanol–2, since "[t]he actual production experience of the Chinese producers is that the Chinese produce refined octanol, not crude octanol, in their production process." Reconsideration Memorandum at 11. Defendant-Intervenors essentially argue that since refined octanol is the actual product sold by the Chinese producers, it is a surrogate value for this product, and not crude octanol–2, that Commerce should use in determining whether a subsidiary product is a

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[6] This does not mean that Commerce may not use Union Camp's internal cost in valuing octanol–2. As indicated in the Remand Memorandum, Commerce must consider and address the appropriateness of using this value, as well as the *Chemical Marketing Reporter* (U.S.) value for octanol–2, in order to have its determination supported by substantial evidence on the record. *Union Camp*, 8 F. Supp.2d at 849–50. Should Commerce determine that Union Camp's internal cost for crude octanol–2 is the best available information, and that use of this figure is supported by substantial evidence on the record, Commerce may use this figure as its surrogate value. Absent such a conclusion, however, nothing in this or the Court's initial Remand Memorandum and Remand Order should be read *as either requiring or prohibiting* the use of this value.

by-product or a co-product. *See id.* at 7–18. Defendant-Intervenors observe that using such a value would be consistent with both Commerce's prior practice and recognized accounting principles, which provide that whether a product is by-product or a co-product is determined by the products' sales value relative to that of the principal product or products produced (in this case, sebacic acid). *Id.* at 12–18. In fact, Defendant-Intervenors even take exception to Commerce's general characterization that the "[p]roduction of sebacic acid results in the production of crude octanol–2 as a subsidiary product." *See id.* at 9 (quoting *Remand Determination* at 5).

For its part, Plaintiff argues that both Commerce and Defendant-Intervenors should be estopped from arguing for the use of a surrogate value for refined octanol, since this Court has already determined that the product produced by the Chinese producers was crude octanol–2. Plaintiff's Response at 3–4. To support its point, Plaintiff observes that neither Commerce nor Defendant-Intervenors had earlier contested its argument to use a surrogate value for crude, rather than refined, octanol–2. *Id.* at 3.

In light of these various comments, two separate issues confront the Court. The first is whether Commerce may use an unadjusted value for "refined" octanol in valuing the octanol–2 that results from the sebacic acid production process. Because this case is being remanded to Commerce for further consideration, it would be premature for this Court to examine whether Commerce's preference for using an unadjusted, refined value for octanol is appropriate. This is especially true in light of Section III (C) of this memorandum, which may preclude Commerce from using the *Chemical Weekly* (India) price as a surrogate upon remand. That said, however, it should be noted that nothing in either the initial Remand Memorandum or the Remand Order should be interpreted as either requiring or prohibiting the use of an unadjusted, refined value as a surrogate. Rather, the Court's Remand Memorandum simply indicates that, in order to be affirmed by the Court, Commerce's choice of a surrogate value must be supported by substantial evidence on the record and be based on a reasonable interpretation of the term "comparable merchandise." *See Union Camp*, 8 F. Supp.2d at 848–50. If, upon remand, Commerce continues to adhere to its position that an unadjusted, refined value is the best available information to use as a surrogate, the Court will uphold this determination so long as it meets these standards.

The second issue that appears to have been raised is whether the subsidiary product produced by Defendant-Intervenors should be referred to as "refined" or "crude" octanol–2. In regard to Commerce's *First Administrative Review* and the parties' respective motions for judgment on the agency record, the Court notes that there was virtually no discussion of whether the octanol–2 at issue should be characterized as "crude" or "refined" in nature. While it is true that Plaintiff argued in its September 25, 1997, brief that the (presumably) large price difference between

refined octanol–1 and crude octanol–2 demonstrates the inappropriateness of using octanol–1 to value octanol–2, Plaintiff simply assumed, without specifically arguing, that the subsidiary product was "crude" octanol–2. *See* Brief In Support Of Union Camp Corporation's Rule 56.2 Motion For Judgment Upon The Agency Record, dated September 5, 1997, at 18. Further, since the characterization of the octanol–2 did not appear to be a point of contention among the parties, the Court never specifically addressed the "crude" versus "refined" octanol–2 issue in its Remand Memorandum and Remand Order. Rather, the Court simply characterized the product produced as "crude" octanol.

In light of the foregoing, it would be incorrect to say either that this "refined" versus "crude" issue was previously litigated, or that the Court decided this issue in its initial Remand Memorandum and Remand Order. At this point in the litigation, it appears that the characterization of the subsidiary product produced by Defendant-Intervenors is a non-issue. Whether characterized as "crude" or "refined" octanol–2, the main issue that Commerce needs to decide is what record evidence constitutes the most appropriate surrogate value for this product. Even assuming, without deciding, that the product produced by Defendant-Intervenors is best described as "crude" octanol–2, there is no particular reason why Commerce could not use a refined price or cost in valuing this product, subject to any necessary adjustments. The appropriateness of such action, again, would depend on whether Commerce's choice of a surrogate value can be supported by substantial evidence on the record and based on a reasonable interpretation of the term "comparable merchandise."

C

USE OF THE *CHEMICAL WEEKLY* (INDIA) VALUE FOR OCTANOL–2 IS STILL NOT SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD.

As noted previously, on remand Commerce identified new evidence on common uses between octanol–1 and octanol–2 to support its position that, notwithstanding the Court's Remand Order, the *Chemical Weekly* (India) value for refined octanol was "the best available information to effectuate [Commerce's] goal of determining the most accurate margins possible." *Remand Determination* at 6. In doing so, however, Commerce continued to assume, without verifying, that the "octanol" value from the *Chemical Weekly* (India) was for octanol–1. Standing alone, such an assumption undermines Commerce's use of this figure, since "octanol" is a generic phrase which covers a full range of products. In this case, however, not only does the lack of verification call Commerce's use of this figure into question, but evidence of which this Court may take judicial notice seems to show that Commerce's assumption is, in fact, incorrect.

As discussed in Section II, in its *Third Administrative Review*, Commerce relied on a letter from the editor of the *Chemical Weekly* (India) in finding that the "octanol" price from this publication was not for octanol–1 or octanol–2, but was for a third product, 2–ethylhexanol. *Third*

Administrative Review, 63 Fed. Reg. at 43,374–75. This conclusion, of course, plainly contradicts Commerce's repeated assertion that the "octanol" quote from the *Chemical Weekly* (India) is for octanol–1, and it renders Commerce's evidence of overlapping uses and composition between octanol–1 and octanol–2 superfluous. Given the apparent contradiction, and given the likelihood that Commerce will continue to assert that the octanol price from the *Chemical Weekly* (India) is the best available evidence, it is appropriate for this Court to take judicial notice[7] of the fact that Commerce, on the basis of the letter from the editor of the *Chemical Weekly* (India), reversed its position in the *Third Administrative Review* and found that the "octanol" quote did not refer to octanol–1. *See Third Administrative Review*, 63 FR 43,374–75 ("Therefore, based on the above information, and absent any substantiated record evidence to the contrary, the Department determines that the octanol value from Chemical Weekly is for 2–ethylhexanol.").

Having taken judicial notice of that fact, the Court orders Commerce, on remand, to open the administrative record and consider the letter from the editor of the *Chemical Weekly* (India) in its choice of an appropriate surrogate value. While the Court notes that it is not ruling on the accuracy or significance of this new evidence, *see Borlem*, 913 F.2d at 940 ("[A]ll we are doing is recognizing that new data exists that the [agency] should evaluate."), it also observes that, unless rebutted, the existence of this evidence appears to undermine Commerce's rationale for using the *Chemical Weekly* (India) "octanol" value as a surrogate. Accordingly, unless Commerce is able to identify substantial record evidence on remand which demonstrates that, notwithstanding the letter from the editor of the *Chemical Weekly* (India), the "octanol" quote from the *Chemical Weekly* (India) is actually a quote for octanol–1, Commerce *may not continue* to argue for the use of this figure on the grounds that octanol–1 and octanol–2 are "comparable merchandise."

In arriving at this result, the Court is mindful of the considerable deference that Commerce enjoys in its administration of the antidumping laws. Such deference, however, is not owed when credible evidence from outside the record indicates a significant error in Commerce's determination. *See, e.g., id.* (upholding remand to ITC for reconsideration of its injury determination in light of its reliance on an ITA dumping margin that was later corrected); *D&L Supply Co. v. United States*, 113 F.3d 1220, 1224 (Fed. Cir. 1997) ("[W]hen the dumping margin on which the BIA rate is based is invalidated [in another judicial proceeding] before the BIA rate has become final, it is irrational to ignore the invalidity of the underlying rate and to uphold the BIA rate as purportedly based on the 'best information available.'"); *Tehnoimportexport v. United States*, 15 CIT 250, 258–59, 766 F. Supp. 1169, 1178 (1991) (holding that "if the error [in ITA's calculations] was so egregious and so obvious that the

[7] The Court takes judicial notice pursuant to Fed. R. Evid. 201(c), which provides, in relevant part, that "[a] court may take judicial notice, whether requested or not." *See Borlem S.A.—Empreedimentos Industriais v. United States*, 913 F.2d 933, 940 (Fed. Cir. 1990) (upholding judicial notice of "the fact that a new and different [margin] determination has been made based on the premise that the earlier one was incorrect").

failure to correct it was an abuse of discretion and undermined the interests of justice, the Court may remand the case to the ITA for adjustment of calculations").

In this regard, the Court is guided by the Federal Circuit's opinion in *Borlem S.A.—Empreedimentos Industriais v. United States*, 913 F.2d 933 (Fed. Cir. 1990). *Borlem* involved an International Trade Commission ("ITC") injury determination that was based, in part, on Commerce's finding of dumping by two Brazilian manufacturers. On remand, however, Commerce changed its position and found that the dumping margins for one of the two producers at issue was *de minimis*. Taking judicial notice of Commerce's new position, this Court remanded the injury determination back to the ITC to consider amending its injury determination in light of Commerce's amended antidumping determination. *See Borlem S.A.—Empreedimentos Industriais v. United States*, 13 CIT 535, 718 F. Supp. 41 (1989), *aff'd* 913 F.2d 933 (Fed. Cir. 1990). On interlocutory appeal, the Federal Circuit upheld the Court's decision, stating explicitly that "deference is not owed to a determination that is based on data that the agency generating those data indicates are incorrect * * *. [t]he law does not require, nor would it make sense to require, reliance on data which might lead to an erroneous result." *Borlem*, 913 F.2d at 937. The Federal Circuit found that where significant events from outside the record are properly brought to the Court's attention after the date of agency action, but before the date of decision, it was proper for the Court of International Trade to take judicial notice of such events and instruct the agency to reconsider its determination. *Id.* at 939. Such a result, the Court held, is effectively "no different from a reversal and remand for reconsideration because a fact relied on is unsupported by the evidence." *Id.* at 940.

Of course, unlike the situation in *Borlem*, in its *Remand Determination* Commerce did not actually rely on potentially erroneous data in its *Remand Determination*. It appears not to have done so, however, only because of ambiguity in the Court's Remand Order. As made clear by both its use of the *Chemical Weekly* (India) value in the *First Administrative Review* and its statements in the *Remand Determination*, Commerce's clear preference is to use this price in determining the Chinese manufacturers' dumping margins, and to justify doing so on the basis of comparability between octanol–1 and octanol–2. Given that background, it would be inappropriate for the Court to wait until Commerce actually used the *Chemical Weekly* (India) value for octanol before instructing it to consider the new evidence from the *Third Administrative Review*. Such a result would needlessly put off until a later day, and another remand, the question of whether the Court should take judicial notice of Commerce's conclusions in the *Third Administrative Review* and order Commerce to consider the letter from the editor of the *Chemical Weekly* (India) in this proceeding. Where possible and proper, the Court can, should and prefers to avoid such a waste of administrative and judicial resources. *See, e.g., Timken Co. v. United States*, 1 F.

Supp.2d 1390, 1393 (CIT 1998) (setting aside a remand order where further investigation would "unnecessarily expend limited administrative resources to conduct additional reviews"); *United States v. Gordon*, 11 CIT 192, 193 (1987) (denying a motion to vacate on the grounds that "[r]equests to vacate interlocutory opinions and orders in dismissed cases invite a waste of judicial resources"); *EAC Engineering v. United States*, 9 CIT 593, 595, 624 F. Supp. 569, 570–71 (1985) (retaining jurisdiction in a classification case on the grounds that "it would be an unnecessary waste of judicial and administrative resources to require Customs to reliquidate the merchandise, and the plaintiff to file a second protest and commence a new action in order to obtain judicial review").

D

COMMERCE MAY REOPEN THE ADMINISTRATIVE RECORD AND CONSIDER NEW EVIDENCE CONCERNING THE COMPARABILITY OF 2–ETHYLHEXANOL AND OCTANOL–2.

Ironically, although the letter from the editor of the *Chemical Weekly* (India) appears to undermine Commerce's proffered rationale for using the *Chemical Weekly* (India) value for "octanol," this and other evidence from the *Third Administrative Review* may provide alternative grounds for using this figure as a surrogate. Specifically, and as discussed previously, in the *Third Administrative Review* Commerce identified evidence concerning similar physical characteristics and uses between 2–ethylhexanol and octanol–2 to support its conclusion that these two products are "comparable merchandise." *See Third Administrative Review*, 63 Fed. Reg. at 43,375. On this basis, Commerce concluded that the *Chemical Weekly* value for "octanol" was an appropriate surrogate and, accordingly, used it in its by-product/co-product determination. *Id.*

Recognizing the existence of such evidence and the conclusions that might be drawn from it, this Court is confronted with the issue of whether Commerce should be allowed, or even ordered, to consider evidence concerning the comparability of 2–ethylhexanol and octanol–2 on remand. Such a result would seem a natural corollary to the fact that this Court is already ordering Commerce to consider the letter from the editor of the *Chemical Weekly* (India), and it would give Commerce an opportunity to use a preferred form of evidence, publically available information from a comparable, developing economy, in its final determination. *See* 19 CFR 353.52(b) (1997) (establishing a hierarchy of surrogates that is to be used in determining a constructed value for the "normal price" of a product). Further, ordering Commerce to consider this evidence would not constitute a waste of governmental resources, since this case is already being remanded on other grounds, and much of the evidence that will need to be evaluated by Commerce was the subject of its *Third Administrative Review*. *Cf. Tehnoimportexport*, 15 CIT at 260, 766 F. Supp. at 1179 ("Since the case is being remanded for recalculation of packing costs, the Court finds that this additional calculation

[correcting an earlier error] will not overburden the agency and will advance the interests of justice and yield a more accurate result.").

Set against these reasons for allowing Commerce to consider new evidence on the comparability of 2–ethylhexanol and octanol–2, however, are various considerations concerning the timely submission of evidence. By ordering Commerce to open the administrative record and consider the letter from the editor of the *Chemical Weekly* (India), the Court seeks to prevent Commerce from relying on what appears to be an erroneous factual assumption. In contrast, directing Commerce to consider new evidence concerning similar uses between 2–ethylhexanol and octanol–2 would allow it to proffer a new explanation, based on evidence outside the original record, as to why the *Chemical Weekly* (India) value for "octanol" is an appropriate surrogate. Neither the letter from the editor of the *Chemical Weekly* (India), nor evidence of overlapping uses between 2–ethylhexanol and octanol–2 were put on the record of this proceeding by Defendant-Intervenors. Accordingly, should Commerce consider such evidence, Defendant-Intervenors would stand to benefit from evidence that it did not submit during the relevant time period of the *First Administrative Review.*

In light of these conflicting policy considerations, the Court, under the doctrine of primary jurisdiction, finds it appropriate to let Commerce determine whether it should consider evidence concerning the comparability of 2–ethylhexanol and octanol–2 on remand. Under the primary jurisdiction doctrine, a court may refer certain matters involving agency expertise back to the agency so that it may, in the first instance, apply its specialized knowledge and experience to the question at hand. *See Borlem S.A. – Empreedimentos Industriais v. United States*, 13 CIT 231, 234, 701 F. Supp. 797, 800 (1989). In *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 64 (1956), the Supreme Court set out guidelines concerning the scope of this doctrine. Although the Court stated that "[n]o fixed formula exists for applying the doctrine of primary jurisdiction," it also made clear that "[i]n every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *Id.* at 64 (1956). Among the well-recognized reasons for this doctrine, the Court noted, were the desire for administrative uniformity and respect for the "expert and specialized knowledge" of agencies in their fields of competence. *Id.* at 64–65. As the Court noted:

> Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by

> specialization, by insight gained through experience, and by more flexible procedure.

Id. at 64 (quoting *Far East Conference v. United States*, 342 U.S. 570, 575 (1952).

In *Borlem*, this Court further clarified that "it would be inappropriate to invoke the doctrine of primary jurisdiction were the question before the Court entirely one of statutory interpretation." *Borlem*, 13 CIT at 237, 710 F. Supp. at 802. *See also Great Northern Railway Co. v. Merchants Elevator Co.*, 259 U.S. 285, 291 (1922) ("To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function.") Rather, primary jurisdiction is appropriately invoked where the question at hand involves complicated issues of administrative policy, practice and procedure that ought best to be resolved by the agency. *Borlem*, 13 CIT at 237, 710 F. Supp. at 802. As the Supreme Court noted in *Western Pacific*:

> [T]he first question presented is whether effectuation of the statutory purposes of the Interstate Commerce Act requires that the Interstate Commerce Commission should first pass on the construction of the tariff in dispute here; this, in turn, depends on whether the question raises issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by the Act.

352 U.S. at 65.

Applying these principles to the question at hand, the Court finds that it is Commerce, and not this Court, which is in the best position to initially decide whether it should consider new evidence concerning the comparability of 2–ethylhexanol and octanol–2. It is a well-established principle of administrative law that an agency is afforded broad discretion to fashion its own administrative procedure, including the authority to establish and enforce time limits concerning the submission of written information and data. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 544–45 (1978). In accord with this authority, Commerce has promulgated regulations which set forth time limits governing the submission of factual information in antidumping investigations. For time limits generally, 19 CFR. § 353.31(a) (1997) requires that "submissions of factual information for the Secretary's consideration shall be submitted not later than * * * seven days before the scheduled date on which the verification is to commence." In addition, 19 CFR § 353.31(a)(2) (1997) allows any interested party to "submit factual information to rebut, clarify, or correct factual information submitted by an interested party * * * at any time prior to the deadline provided in this section for submissions of such factual information or, if later, 10 days after the date such factual information is served on the interested party * * *."

The regulations further provide an exception to these time limits, however, for instances where the Secretary requests or solicits factual information. 19 CFR § 353.31(b) (1997) states, in part, that:

> (1) Notwithstanding paragraph (a) of this section, the Secretary may request any person to submit factual information at any time during a proceeding.
>
> (2) In the Secretary's written request to an interested party for a response to a questionnaire or for other factual information, the Secretary will specify the time limit for response.

In applying these regulations to the investigations before it, Commerce regularly balances its interest in conducting an efficient, uniform and expeditious administrative investigation against its equally compelling interest in conducting accurate factfinding. Such a weighing of competing interests involves choices of administrative practice and procedure which Commerce, in its specialized role as administrator of antidumping investigations, is uniquely qualified to make.[8] For this reason, the Court finds the question of whether to accept new evidence concerning the comparability of 2–ethylhexanol and octanol–2 to be an issue relating to the administration of antidumping investigations which, in the interest of a uniform and expert administration of such investigations, ought to be considered by Commerce in the first instance.

Accordingly, upon remand, Commerce is instructed to consider, and express its views on, whether it should accept new evidence concerning the comparability of 2–ethylhexanol and octanol–2. Should Commerce come to the conclusion that it should accept such evidence, Commerce may do so on remand and, if appropriate, use this evidence as a basis for justifying its use of the *Chemical Weekly* (India) value for "octanol." In so doing, Commerce may, but need not, limit its search for information to that submitted during the *Third Administrative Review.* Similarly, Commerce, in its discretion, may also seek or request further information (in addition to the letter from the editor of the *Chemical Weekly* (India) submitted for the *Third Administrative Review*) concerning the true nature of the "octanol" quote from the *Chemical Weekly* (India).[9]

IV

CONCLUSION

For the foregoing reasons, the Court grants Defendant-Intervenors' Motion For Reconsideration. Accordingly, the Court further remands this case to Commerce with instructions that Commerce:

> 1. value the octanol–2 that results from the sebacic acid production process based on an appropriate surrogate value for this prod-

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[8] Of course, reflecting the significant deference and flexibility given to Commerce in its conduct of antidumping investigations, this Court does not review Commerce's administrative decisions *de novo.* Rather, 19 U.S.C. § 1516a(b)(1)(B) (1994) provides that the Court "shall hold unlawful any determination, finding, or conclusion found * * * to be unsupported by substantial evidence on the record, or otherwise not in accordance with law."

[9] It should be noted that, by invoking the doctrine of primary jurisdiction, the Court is not abdicating its jurisdiction over these questions. Rather, "[u]pon completion of the remand proceedings, this Court will review all the [agency's] actions to determine if they are based upon substantial evidence and are in accordance with law." *Borlem*, 13 CIT at 237, 710 F. Supp. at 802.

uct, and then recalculate the by-product/co-product determination in light of this surrogate value. This surrogate value may be an appropriate foreign or U.S. price or cost for comparable merchandise. In seeking the best available information to use as a surrogate, Commerce is to specifically consider and address all alternative surrogate values that have been placed on the record by the parties;

2. open the administrative record and consider the letter from the editor of the *Chemical Weekly* (India). Unless Commerce is able to identify substantial record evidence on remand which demonstrates that, notwithstanding the letter from the editor of the *Chemical Weekly* (India), the "octanol" quote from the *Chemical Weekly* (India) is actually a quote for octanol–1, Commerce may not continue to argue for the use of this figure on the grounds that octanol–1 and octanol–2 are "comparable merchandise;" and

3. consider, and express its views on, whether it should accept new evidence concerning the comparability of 2–ethylhexanol and octanol–2. Should Commerce come to the conclusion that it should accept such evidence, Commerce may do so on remand and, if appropriate, use this evidence as a basis for justifying its use of the *Chemical Weekly* (India) value for "octanol."

In addition, the Court observes that nothing in its Remand Memorandum or Remand Order of March 27, 1998, should be interpreted as either requiring or prohibiting the use of an unadjusted, refined value as a surrogate for octanol–2. Rather, if, upon remand, Commerce continues to adhere to its position that an unadjusted, refined value is the best available information to use as a surrogate, the Court will uphold this determination so long as its choice of a surrogate is supported by substantial evidence on the record and is otherwise in accordance with law. This will be true regardless of whether the octanol–2 produced by Defendant-Intervenors is characterized as "crude" or "refined" in nature.

As a final note, the Court wishes to express its concern with the manner in which the Department of Commerce conducted the *Remand Determination*. As discussed above, the Court erred in its Remand Order of March 27, 1998, in stating that Commerce was to "value octanol–2 based on an appropriate cost." While not technically incorrect, the Court's failure to say "cost or price," or use the more generic term "value," could, if read in isolation, be interpreted as limiting Commerce to consider only record evidence of "costs" upon remand. To arrive at such a narrow result, however, Commerce would have had to ignore the obvious implications of the Court's findings in the Remand Memorandum, and it would have had to interpret the Court's Remand Order as directly conflicting with its statutory obligations. That is exactly what Commerce did. *See infra*, Section III (B)(2).

In so interpreting the Court's Remand Order, Commerce displayed what can best be described as a lack of common sense. While Commerce certainly should pay great attention to the particular language used in a court order, it is not to interpret the Court's language in a vacuum. Rather, if a slip opinion has been issued along with an order or judgment, Commerce should use that document in resolving any questions that

may arise. Similarly, Commerce should avoid interpreting a court order in a way that creates a conflict with the discretion conveyed to it by statute. A proper role of courts is to clarify the scope or meaning of any order they issue, upon appropriate request. Had Commerce here sought such a clarification before issuing its *Remand Determination*, much of the time and cost associated with the current litigation, as well as the further remand, could have been avoided. All attorneys, especially those employed by the government, are obliged to their clients, the judicial system, and society in general, to maximize scarce resources and minimize waste. This Court should not have to again remind Commerce and its attorneys of that obligation.

(Slip Op. 99–42)

THAI PINEAPPLE CANNING INDUSTRY CORP., LTD., AND MITSUBISHI INTERNATIONAL CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND MAUI PINEAPPLE CO., LTD., AND INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, DEFENDANT-INTERVENORS

Court No. 98–03–00487

[ITA determination remanded.]

(Dated May 5, 1999)

Dickstein Shapiro Morin & Oshinsky LLP (Arthur J. Lafave, III, Douglas N. Jacobson, and *Patricia M. Steele)* for plaintiffs.

David W. Ogden, Acting Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Lucius B. Lau), Stacy J. Ettinger*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

OPINION

RESTANI, *Judge:* This motion is before the court on Plaintiffs' Motion for Judgment on the Administrative Record, pursuant to CIT Rule 56.2. Plaintiffs seek review of the final results of the first administrative review of the antidumping duty order on *Canned Pineapple Fruit from Thailand*, 63 Fed. Reg. 7,392, 7,392 (Dep't Commerce 1998) [hereinafter *"Final Results"],* covering sales to the United States during the period January 11, 1995, through June 30, 1996.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994). In reviewing final determinations in antidumping duty investigations, the court will hold unlawful those agency determinations which are unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i) (1994).

PROCEDURAL HISTORY

On July 18, 1995, the United States Department of Commerce ("Department" or "Commerce") published an antidumping duty order on canned pineapple fruit ("CPF") from Thailand. *Canned Pineapple Fruit from Thailand*, 60 Fed. Reg. 36,775, 36,776 (Dep't Commerce 1995). On August 15, 1996, the Department published a notice initiating an administrative review for sales during the period January 11, 1995, through June 30, 1996. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation*, 61 Fed. Reg. 42,416, 42,417 (Dep't Commerce 1996). Initial questionnaires were issued on September 5, 1996, to Thai Pineapple Canning Industry Corp., Ltd. ("TPC"), Princes Foods B.V. ("Princes") and Mitsubishi International Corp. ("MIC"). Princes is a TPC affiliate, located in the Netherlands, that resells canned pineapple fruit into the German market. Pl.'s Br. at 4. MIC is an affiliated reseller in the United States. *Id.* TPC reported third-country sales to Germany in its sales responses because the home market was not viable. *TPC Questionnaire Response* (Nov. 13, 1996), at 2–3, P.R. Doc. 35, Pl.'s App., Tab 3, at 2–3.

The Department initiated a below-cost sales investigation on January 13, 1997. *Canned Pineapple Fruit from Thailand*, 62 Fed. Reg. 42,487, 42,487 (Dep't Commerce 1997) (prelim. results and partial termination of antidumping duty admin. rev.) [hereinafter "*Preliminary Results*"]. TPC, Princes, and MIC participated in verifications conducted in May and June 1997 in Thailand, the Netherlands, and the United States, respectively. Pl.'s Br. at 5. Following verification, the Department issued the *Preliminary Results* on August 7, 1997. 62 Fed. Reg. at 42,487. The Department provided interested parties the opportunity to comment on its *Preliminary Results*. *See id.*

After issuance of the *Final Results* on February 13, 1998, TPC filed a letter alleging a clerical error. *Letter to Commerce* (Feb. 17, 1998), at 1, C.R. Doc. 95, Pl.'s App., Tab 7, at 1. TPC noted that, without comment, the Department calculated in the *Final Results* a single assessment rate for two separate importers, Mitsubishi Foods, Inc., ("MFI") and MIC, even though it had calculated separate rates for each of these companies in its *Preliminary Results*. *Id.* at 1–2. The Department issued a memorandum concluding that its calculation of a single assessment rate for these two companies was not a clerical error and was in accordance with its practice regarding affiliated importers. *Memo from Commerce* (March 5, 1998), at 2–3, P.R. Doc. 204, Pl.'s App., Tab 2, at 2–3.

At issue in this review are the propriety of the single weighted-average cost of production for the entire period of review ("POR"), the selection of date of sale for third-country sales, the calculation of profit for constructed export price ("CEP") purposes, the assessment rate on sales outside the cap period established by 19 U.S.C.A. § 1673f (West Supp. 1999), and the related issue of the propriety of a single assessment rate for MIC and its predecessor, MFI. The final issue of the assessment rate on entries made after the *Final Results* is remanded per agreement

of the parties, as neither plaintiffs nor Commerce had an adequate opportunity to address this issue. Facts regarding the remaining issues will be set forth in connection with each issue separately.[1]

I. Use of a Single Weighted-Average Cost of Production Covering Entire 18-Month Period of Review

A. Facts

As noted, the challenged administrative review results involved CPF from Thailand which entered the United States during the period January 11, 1995, through June 30, 1996. *Final Results*, 63 Fed. Reg. at 7,392. As part of its antidumping analysis, Commerce conducted a cost of production ("COP") investigation of TPC's third-country sales.[2] *Id.* Because certain CPF products produced by TPC failed the COP test as applied by Commerce, Commerce used constructed value ("CV") as the basis of normal value ("NV")[3] where (1) there were no contemporaneous sales of a comparable product or (2) all contemporaneous sales of a comparable product failed the COP test. Gov't Br. at 14. For both COP and CV, Commerce determined the cost of production of CPF using a single, weighted-average cost for the entire period of review. *Final Results*, 63 Fed. Reg. at 7,399–7,400.

Given generally rising costs,[4] TPC computed a separate cost for each fiscal period covered by its sales responses—1994, 1995, and 1996—and submitted them in its cost responses with a request that the Department use the separate fiscal period costs for its determinations of COP and CV. *TPC Section D Questionnaire Response* (Feb. 18, 1997), at 27, C.R. Doc. 31, Pl.'s App., Tab 11, at 2. Notwithstanding TPC's request, the Department calculated a single "average" COP and a single "average" CV based on costs of production computed over the period January 1, 1995, to June 30, 1996. *Final Results*, 63 Fed. Reg. at 7,399–7,400. Plaintiffs allege that the calculation of a single, weighted-average cost over this period, and the use of that cost for comparison to sales prices early in the period, resulted in significant distortions in the Department's price-cost comparisons, including distortions in its determina-

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[1] Defendant-intervenors Maui Pineapple Co., Ltd., elected not to file a response brief and did not otherwise participate in the substantive aspects of this case.

[2] Third country sales are sales of like merchandise in other than the United States or the exporting country. *See* 19 U.S.C. § 1677b(a)(1)(B)(ii) (1994).

[3] If sufficient quantities of goods are sold in the country of production above the cost of production, normal value will be based on home country sales prices. If home country sales are not usable, Commerce may use third country sales or CV, which is based on COP, as normal value. *See* 19 U.S.C. § 1677b(a).

[4] By plaintiff's calculations, fresh pineapple costs per carton of CPF, computed using the Department's net realizable value ("NRV") method, rose by [ ]% from 1994 to 1995 and by [ ]% from 1994 to 1996. *See Memo from Commerce* (July 31, 1997), at Sch. 1, C.R. Doc. 86, Pl.'s App., Tab 9, at 2 ([ ] baht per standard carton in 1995 and [ ] in 1996); *TPC Case Brief* (Sept. 8, 1997), at Attachment 1, C.R. Doc. 87, Pl.'s App., Tab 10, at 9 ([ ] baht per standard carton in 1994).

Fresh pineapple costs account for about [ ]% of the finished product cost. Plaintiff arrives at this calculation by dividing the Total Net Pineapple Cost to CPF of [ ] by total standard cases, [ ], to yield fruit costs of [ ] baht per carton and comparing this with total cost of manufacturing ("TOTCOM") for 1995 products ranging from [ ] baht per carton to [ ] baht per carton. *Memo from Commerce*, at Sch.s 1 and 5(a), Pl.'s App., Tab 9, at 2–3. In addition, interest expenses ("INTEX"), calculated according to the methodology used by the Department in its Preliminary and Final Results, amounted to [ ]% of cost of manufacturing ("COM") in 1995, but were [ ] in 1994. *TPC Case Brief*, at 7, Pl.'s App., Tab 10, at 2.

Therefore, plaintiffs calculate that finished product costs rose by [ ]% from 1994 to 1995 and by [ ]% from 1994 to the first half of 1996. Pl.'s Br. at 8 (computed by multiplying the increase in fresh fruit cost by [ ] to derive the increase in COM and adding [ ]% for increased interest expenses).

tion of which sales should be disregarded as below cost and in the Department's determination of CV. *Id.* at 7,399. Plaintiffs allege in particular that distortion occurred because the Department did not match up 1995 sales with the low 1994 costs related thereto.[5] *Id.*

Commerce contends that costs did not rise in a continuous manner over that entire POR and that a period-wide weighted-average was approved in *Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1038–39 (Fed. Cir. 1996).

B. Discussion

It is apparent to the court that Commerce has read too much into *Fujitsu*, which is readily distinguishable. First, *Fujitsu* approved costs constructed on an annual basis. *Id.* at 1039 ("decision to sustain Commerce's use of *annual* weighted-average COP in calculating FMV * * * correct.") (emphasis added). This is basically all plaintiffs seek here. They want costs for a fiscal year matched to sales for a fiscal year.[6] In *Fujitsu*, respondents sought monthly or quarterly averaging. *Id.* at 1036.

Second, almost all of the factors which the appellate court found were missing in *Fujitsu* are present here. *Fujitsu* involved multi-input television receivers, *id.*, not a one primary-input product, such as canned pineapple from raw pineapple. In such a case, Commerce must be particularly sensitive to changes in the price of the raw commodity. *See e.g. Brass Sheet and Strip From the Netherlands*, 53 Fed. Reg. 23,431, 23,432–33 (Dep't Commerce 1988) (final LTFV determ.) (POR split to account for metal price rise).[7] Next, the *Fujitsu* court noted no significant cost rise from the beginning to the end of the POR. *Fujitsu*, 88 F.3d at 1039. Here, a cost rise of almost 50% occurred over eighteen months, notwithstanding the fact that there was a tremendous cost rise mid-review which moderated somewhat by June 1996. *See* Pl.'s Br. at Tab C (reflecting monthly fresh pineapple costs from January 1995 to June 1996).

In the past, the Department has adjusted for changes in costs over the POR or matched costs to POR sales more specifically than it did here. The court notes a few particularly telling examples. In *Certain Cold-Rolled Carbon Steel Flat Products from Germany*, for example, the Department relied upon separate fiscal year costs and allocated expense

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[5] Because there is a 30–40 day transit time from Thailand to the United States, *TPC Case Brief*, at 40, Pl.'s App., Tab 10, at 8) and merchandise is typically held in inventory in the United States for [ ] months prior to sale to the first unaffiliated customer, most of the merchandise in CEP comparison sales made by TPC's affiliate MFI in the first few months of the POR appear to have been manufactured in 1994. *See id.* at 9, Pl.'s App., Tab 10, at 4; *TPC Questionnaire Response* (Nov. 12, 1996), at Ex. 56, C.R. Doc. 5, Pl.'s App., Tab 12, at 4 (showing number of days of approximately [ ] months); *TPC Verification Ex. No. LA–18*, at 1, C.R. Doc. LA–18, Pl.'s App., Tab 14, at 1 (showing number of days of approximately [ ] months). TPC brought this fact to the Department's attention in its initial responses, reported the year of manufacture in its response, and suggested that the Department calculate a separate fiscal period COP and CV for 1994 production. *Final Results*, 63 Fed. Reg. at 7,399.

[6] Because the POR does not match up with TPC's fiscal year, this might necessitate a 6-month averaging period, but this does not seem greatly burdensome.

[7] Defendant is incorrect that this was necessitated by the difference in merchandise provision because similar, not identical, merchandise was used for comparison. The *Brass Sheet* respondents requested a circumstances of sales adjustment to account for a 70% metals price rise. This was denied, and separate foreign market values were computed for four-month periods. Comparison U.S. sales were matched to the periods. *See Brass Sheet* 54 Fed. Reg. at 23,432–433.

data for sales observations according to the year in which the sales took place. 60 Fed. Reg. 65,264, 65,270 (Dep't Commerce 1995) (final results of antidumping duty admin. rev.).[8]

Commerce admits that there is a basic principle that Commerce will utilize shorter cost reporting periods if markets experience significant and consistent price declines. *See, e.g., Static Random Access Memory Semiconductors from Taiwan*, 63 Fed. Reg. 8,909, 8,920 (Dep't Commerce 1998)(final LTFV determ.). Commerce has not explained why significant price rises are not worthy of such an adjustment.[9]

Finally, the Department cannot explain away the following cases. In *Sweaters Wholly or in Chief Weight of Man-Made Fiber from Taiwan*, the Department did not use annual average unit costs where there was a significant variation between what was produced during the POR and what was sold during the POR. 55 Fed. Reg. 34,585, 34,596 (Dep't Commerce 1990) (final LTFV determ.) [hereinafter "*Sweaters*"]. Instead the Department used the costs of the individual production runs (whether or not falling within the POR) in which the subject merchandise was actually produced. *Id.* In *Fresh and Chilled Atlantic Salmon from Norway*, the Department found that a single average cost of cultivation (COC) should not be calculated for the POR, stating:

> [B]ecause no 1990-generation salmon were harvested until 1991, averaging the COC for 1990-generation salmon with the 1989-generation salmon could lead to distortions in determining whether 1990-third country sales were made at prices below cost. Moreover, *given the fluctuations of farmers' costs during the POR, the ease with which different generations' COC can be segregated, and the fact that we have calculated separate 1990 and 1991 processing costs for respondent Skaarfish*, we believe it is reasonable to use separate 1990 and 1991 COCs.

58 Fed. Reg. 37,912, 37,913 (Dep't Commerce 1993) (final results of antidumping duty admin. review) (emphasis added).

It is insufficient to cast away previous decisions on the basis that the extent of the distortion was not noted. This cannot be a way to insulate inconsistent decisions from review. While it is certainly true that the need to use monthly averages generally may be restricted to cases of hyper inflation, *see Asociacion Colombiana de Exportadores de Flores v. United States*, 6 F. Supp.2d 865, 873–74 n.7 (Ct. Int'l Trade 1998), even Commerce recognizes that there is a middle range choice of six months to one year averaging. There is also the possibility of matching costs more closely with sales, as various administrative determinations indicate.

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[8] Defendant is incorrect that this was done only for the general expenses calculation. It is apparent from the discussion that separate fiscal year costs and expenses were used for all elements of constructed value because the respondent reported them that way. *See Certain Cold-Rolled Carbon Steel Flat Products from Germany*, 60 Fed. Reg. at 65,270.

[9] Moreover, in the preliminary determination in *Static Random Access*, the Department stated that it would generally "compare sales and conduct the sales below cost test using annual averages. However, where *prices have moved significantly* over the course of the POI, it has been the Department's practice to use shorter time periods." *Static Random Access Memory Semiconductors from Taiwan*, 62 Fed. Reg. 51,442, 51,444 (Dep't Commere 1997) (prelim. determination of sales at LTFV) (emphasis added). This statement further shows there is no reason to limit the use of shorter cost reporting periods to instances when the market experiences price declines and not when it experiences price increases.

Given the distortions in calculating COP and CV caused by inattention to the price rise for a single primary input product, and the lag between goods produced (in a one-day canning process) but not sold until months later, Commerce must revisit this issue.

Commerce must reanalyze the data to determine whether TPC has provided sufficient data to match costs to appropriate fiscal year sales. If it has, in the absence of any proper antidumping policy reason[10] for not doing this seemingly minimally burdensome and substantially less distortive comparison, Commerce must proceed as it has in the past and match fiscal year costs with sales.

II. Use of Date of Contract for Date of Third Country Sale

A. Facts

In its antidumping analysis, Commerce identifies a "date of sale" for merchandise sold to the United States, the exporting country, and third countries. In the *Final Results*, Commerce recognized the existence of two dates associated with TPC's export price ("EP") and third-country sales: the earlier date of contract and the later date of invoice. *See* 63 Fed. Reg. at 7,394. Commerce examined these dates and found that all but five of the third country sales[11] had identical terms in both the contracts and the invoices. *Id.* Thus, Commerce determined that the date of contract was the proper date of sale because the contract, not the invoice, established the material terms of sale. *Id.*

B. Discussion

The first question to ask is what principle should guide Commerce in choosing the date of sale. It appears undisputed that in the past, in general, Commerce has looked to the date by which the essential terms of sale are fixed in order to determine date of sale. *See Al Tech Specialty Steel Corp. v. United States*, No. 97–08–01328, 1998 WL 661461, at *2 (Ct. Int'l Trade 1998) (citing cases). This seems reasonable if one is trying to compare sales in two markets or costs and sales.

There is no new statutory guidance on this point except for the general statement that NV shall be the price "at a time reasonably corresponding to the time of the sale used to determine the export price or constructed export price." 19 U.S.C. § 1677b(a)(1)(A). There was no regulation on point applicable to the investigation at issue.

On March 29, 1996, Commerce stated in an internal memorandum that it had published proposed regulations which provide that the agency would normally establish the date of invoice as the date of sale. Pl.'s Br. at Tab D. Commerce further stated that it was implementing this change immediately in all reviews initiated after April 1, 1996. *Id.* The administrative review at issue here was initiated on August 15, 1996. *Initiation of Antidumping Duty and Countervailing Duty Admin.*

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[10] Commerce's answer that respondents would only provide pre-POR cost data when it suited them does not appear to be a sufficient reason. Commerce can ask for relevant cost data if costs are either declining or rising significantly and it has not been stopped by such a concern in the past. *See, e.g., Sweaters*, 55 Fed. Reg. at 34,596.

[11] Five of [ ] third country sales had contract changes. Gov't's Br. at 27. One of several hundred EP sales had changes. *Final Results*, 63 Fed. Reg. at 7,394.

Reviews, 61 Fed. Reg. at 42,417. The proposed regulations referenced by Commerce in its March 29, 1996, memorandum were ultimately issued as final regulations on May 19, 1997. *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,296 (Dep't Comm. 1997) ("*Final Regulations*"). The *Final Regulations*, however, only apply to reviews requested on or after July 1, 1997. *See* 19 C.F.R. § 351.701 (1998). With regard to reviews conducted pursuant to the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103–465, 108 Stat. 4809 (1994), but not formally subject to the *Final Regulations*, Commerce stated, "[P]art 351 will serve as a restatement of the Department's interpretation of the requirements of the Act as amended by the URAA." *Id.* In this case, Commerce did not refer to the regulations as controlling, but, rather, discussed the regulations as reflecting Commerce's current practice with respect to date of sale. *Final Results*, 63 Fed. Reg. at 7,394 n.2.

Notwithstanding its new policy preference to utilize the date of invoice as the default date of sale, Commerce determined that the date of contract for TPC's EP and third-country sales should determine the date of sale. *Id.* at 7,394. In the *Final Results*, Commerce stated that its new preference for the date of invoice would apply "'absent satisfactory evidence that the terms of sale were finally established on a different date.'" *Id.* (quoting the *Final Regulations*, 62 Fed. Reg. at 27,349). With regard to TPC, Commerce stated that it found sufficient evidence that the terms of sale were established on a different date. As noted by Commerce, "[t]he evidence on the record indicates that there were changes to the contracted terms of TPC's POR sales for only one out of several hundred EP sales, and five out of several hundred third country sales." *Id.* For this reason, Commerce determined that the date of contract should act as the date of sale because all material terms of sale were established at the time of contracting. *Id.*

Accepting this as a statement of policy that applied to this proceeding, it appears that the number of changes noted may not be particularly probative of whether or not this is an industry in which renegotiation is common, or whether the terms of the sales were firmly set on the contract date. Thus, why this was accepted as evidence warranting departure from the general invoice date policy is not clear.

How the new policy is being applied remains something of a mystery. Plaintiffs offer three examples of administrative decisions that at least cause some concern that Commerce acted inconsistently in this case. *See Small Diameter Circular Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe From Germany*, 63 Fed. Reg. 13,217, 13,226 (Dep't Commerce 1998) (final results of antidumping admin. review) (use of shipment date for date of sale when invoice date after shipment; sales terms not fixed until date of shipment; decision references post-contract changes, but the amount is not specified); *Open-End Spun Rayon Singles Yarn from Austria*, 62 Fed. Reg. 14,399, 14,399–400 (Dep't Commerce 1997) (prelim. LTFV determ.) (invoice date used for short term contracts where little lag time between the date of shipment

and date of invoice; no discussion of use of sales contract date); *Certain Stainless Steel Wire Rod from India*, 62 Fed. Reg. 38,976, 38,979 (Dep't Commerce 1997) (final results of antidumping admin. review) (invoice date used because no long term contracts and short period between purchase orders and invoice); *see also Koenig & Bauer-Albert AG v. United States*, 15 F. Supp.2d 834, 843 n.3 (Ct. Int'l Trade 1998) (date of sale established upon invoice and shipment to allocate indirect selling expenses to POR U.S. sales; substantial gap between sale and shipment).

Neither in the *Final Results*, nor in its arguments to the court, has Commerce offered evidence that long term contracts or long lag time between contract and shipment or invoice was a concern in this case. If there is another reason for rejecting invoice date which Commerce did not have reason to state in the cases cited, it should state that reason. Commerce must reconsider this issue and square its reasoning with its other contemporaneous determinations.

III. Calculation of CEP Profit

A. Facts

Under 19 U.S.C. § 1677a(c) and (d) (1994), CEP is adjusted for various items which are expected to be found in the sales price.[12] One of the reductions to price for purposes of arriving at CEP is profit. 19 U.S.C. § 1677a(d)(3).

Profit is calculated according to 19 U.S.C. § 1677a(f) (1994), which reads:

> **(f) Special rule for determining profit**
>
> **(1) In general**
>
> For purposes of subsection (d)(3) of this section, profit shall be an amount determined by multiplying the total actual profit by the applicable percentage.
>
> **(2) Definitions**
>
> For purposes of this subsection:
>
> **(A) Applicable percentage**
>
> The term "applicable percentage" means the percentage determined by dividing the total United States expenses by the total expenses.
>
> **(B) Total United States expenses**
>
> The term "total United States expenses" means the total expenses described in subsection (d)(1) and (2) of this section.
>
> **(C) Total expenses**
>
> The term "total expenses" means all expenses in the first of the following categories which applies and which are incurred by or on behalf of the foreign producer and foreign exporter of the subject merchandise and by or on

[12] CEP is a constructed United States price which is compared to NV to determine if the merchandise at issue is being sold at less than fair value in the United States. CEP is intended to be an approximation of *ex factory* price, and it is used in place of export price when affiliated U.S. sellers, rather than the exporters, make the U.S. sales. *See* 19 U.S.C. § 1677a(b) (1994).

behalf of the United States seller affiliated with the producer or exporter with respect to the production and sale of such merchandise:

> (i) The expenses incurred with respect to the subject merchandise sold in the United States and the foreign like product sold in the exporting country if such expenses were requested by the administering authority for the purpose of establishing normal value and constructed export price.
>
> (ii) The expenses incurred with respect to the narrowest category of merchandise sold in the United States and the exporting country which includes the subject merchandise.
>
> (iii) The expenses incurred with respect to the narrowest category of merchandise sold in all countries which includes the subject merchandise.

(D) Total actual profit

The term "total actual profit" means the total profit earned by the foreign producer, exporter, and affiliated parties described in subparagraph (C) with respect to the sale of the same merchandise for which total expenses are determined under such subparagraph.

Id.

For its *Final Results*, the Department calculated CEP profit by computing the ratio of total profit to total expenses and multiplying that ratio, on a transaction-by-transaction basis, by reported U.S. selling expenses. *Final Results*, 63 Fed. Reg. at 7,395. The statute dictates a different approach. The statute calls for multiplication of total profit by the ratio of total United States expenses to total expenses. *See* 19 U.S.C. §§ 1677a(f)(1)–(2)(A). Theoretically, the two computations should yield the same result: A * B/C = A/C * B. The Department apparently adopted its method because total profit is generally not computed on a per-unit basis, but is calculated in gross. Therefore, the Department divides the total profit in gross by the total expenses in gross and multiplies by unit U.S. selling expense for an individual sale to obtain a unit profit.

The statute's drafters intended that profit would be allocated to U.S. sales in the same ratio as United States selling expenses are to total expenses (i.e., that the portion of total profit on a sale attributable to activities conducted in the United States is equal to the ratio of the cost of those activities to the cost of all activities generating the sales revenue). As explained in the Statement of Administrative Action ("SAA"),[13] the profit to be deducted from the CEP is the profit "allocable to the selling, distribution, and further manufacturing expenses in the United States." SAA accompanying the URAA, H.R. 103–5110, H.R. Doc. No. 316, Vol. 1, 103d Cong. 2d Sess. (1994), at 823, *reprinted in* 1994

[13] The Statement of Administrative Action represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round Agreements * * * The Administration understands that it is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this statement." SAA, at 1.

U.S.C.C.A.N. 3773, 4163. "The profit to be deducted from the starting price in the U.S. market is that proportion of total profit equal to the proportion which U.S. manufacturing and selling expenses constitute of total manufacturing and selling expense." SAA, at 824.

The Department does include U.S. imputed expenses in the numerator of the applicable percentage or ratio but not in the denominator. *See Final Results*, 63 Fed. Reg. at 7,394. The Department also excludes imputed expenses from the total actual profit figure required by 19 U.S.C. § 1677a(f)(2)(D), which perforce represents total expenses deducted from total revenue. It then uses the total expense figure for purposes of the statutory ratio. Commerce is not following the statutory formula precisely. It is focusing on creating symmetry in the ratio it constructs, i.e., total profit to total expenses, as opposed to the ratio established by the statute, total U.S. expenses to total expenses. The question before the court, therefore, is whether this is permissible.

Both parties' briefs failed to cite the court's decision which is most on point, *U.S. Steel Group v. United States*, 15 F. Supp.2d 892, 896–98 (Ct. Int'l Trade 1998).[14]

B. Discussion

In *U.S. Steel*, the court ruled that, under 19 U.S.C. § 1677a(f), the statutory ratio applied to "actual profit" for purposes of calculating CEP profit must be calculated on a proportional basis. 15 F. Supp.2d at 896–98. The court left undecided whether the "actual" profit calculation under 19 U.S.C. § 1677a(f)(2)(D) must include categories of expenses present in the ratio. *See id.* at 898 n.6. The court indicated that defendant had presented no argument that this was so. *Id.*

In this action, defendant has attempted an explanation of why actual profit should not contain "imputed expenses" based on the use of the word "actual" in 19 U.S.C. § 1677a(f)(2)(D), but not elsewhere in the provision. This is facially a plausible reason for the omission. Commerce's argument misses the mark, however, where it indicates that the statute and the SAA require that total expenses in the statutory ratio applied to actual profit must be exclusive of imputed expenses just because some form of total expenses is also used in the actual profit calculation.

First, in the total actual profit provision, 19 U.S.C. § 1677a(f)(2)(D), the term "total expenses" is used simply to indicate the pool of sales from which to calculate actual profit. Second, the SAA makes clear that the *pool of sales* involved is the same for both total expenses in the ratio and total actual expenses in the total actual profit calculation. SAA, at 824–25. Third, the three alternatives for selection of a sales pool for calculation of expenses found at 19 U.S.C. § 1677a(f)(2)(C) do not relate directly to the selection of the categories of expenses to be used in the

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[14] This is a particularly egregious error on the part of the Government, as the case is adverse to its position. Upon discovering the case during preparations for oral argument, counsel should have advised opposing counsel and the court. Failure to do so impeded oral argument.

ratio. As with subsection 1677a(f)(2)(D), it is the choice of the sales pool which is specified, not categories of expenses.

Commerce has some flexibility in determining total U.S. expenses under 19 U.S.C. §§ 1677a(d)(1)–(2), the figure which is used in the ratio calculation, pursuant to 19 U.S.C. § 1677a(f)(2)(B). But if Commerce decides to include a category of expenses in calculating total U.S. expenses in the numerator, it must also include such expenses in the denominator of the ratio, unless they are already represented in total expenses in some other fashion. *See U.S. Steel*, 15 F. Supp.2d at 898. The statutorily defined denominator represents a figure containing both total U.S. expenses and the expenses attributable to the foreign like product sold in the home market. *See* 19 U.S.C. § 1677a(f)(2)(C)(i). Commerce cannot arbitrarily remove part of the total U.S. expenses from the statutory ratio.

The court concludes that there is some ambiguity in the use of the word "actual" in § 1677a(f)(2)(D). It may not be an unreasonable interpretation to conclude that imputed expenses should be excluded in the actual profit calculation, if that construction can be squared with the necessity of a properly calculated statutory ratio. It is a proper ratio that ensures proper allocation of profit to U.S. sales. If the profit allocable to CEP is somewhat lower because U.S. expenses are made higher by the addition of imputed expenses, this would not seem to be antithetical to the statute. There is also nothing that categorically prevents the inclusion of imputed expenses. Rather, imputed expenses should be omitted from actual profit if they duplicate expenses already accounted for. Their inclusion is not *per se* incompatible with the use of the word "actual." The question is whether the imputed expenses represent some real, previously unaccounted for, expense.

Commerce may not ignore the statutory language just because, for administrative reasons, it has chosen a different starting point for its profit calculation. Of course, it may continue to use a different form of calculation if the result comports with the statute. What Commerce must do in this case is to start with the statutory scheme. If its method of calculating U.S. expenses is not compatible with the new CEP statute, it must amend that approach. It cannot ignore that "total expenses" in the denominator includes both U.S. expenses and expenses allocable to the foreign sold product. *See* 19 U.S.C. § 1677a(f)(2)(C). Of course, if the imputed expenses are simply a part of an expense which was allocated to U.S. sales, and that portion is fully retained as to the foreign sales as a part of "total expenses," it is perforce included in the denominator of the ratio. If this is so, Commerce needs to support this with citations to the record.[15] Commerce has not established that the expenses at issue are already in the denominator and thus, has not distinguished *U.S. Steel*. This issue is remanded for calculation in accordance with this opinion.

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[15] Commerce provides no record appendix with its brief, nor did it cite to portions of the appendix provided by plaintiff.

IV. Use of a Single Assessment Rate

A. Facts

If Commerce makes a final affirmative dumping determination and the International Trade Commission ("ITC") makes a final affirmative injury determination, the statute requires that Commerce publish an antidumping order which directs Customs to "assess an antidumping duty equal to the amount by which the normal value of the merchandise exceeds the export price (or the constructed export price) of the merchandise" and to collect cash deposits for estimated antidumping duties pending liquidation of entries. *See* 19 U.S.C. § 1673e(a)(1),(3) (1994). If an administrative review is subsequently requested, the statute provides that Commerce will "review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty." 19 U.S.C. § 1675(a)(1)(B) (1994). "[P]aragraph (2)" provides that Commerce shall determine "the normal value and export price (or constructed export price) of *each entry* of the subject merchandise" and "the dumping margin for *each such entry*." 19 U.S.C. § 1675(a)(2)(A) (emphasis added).

The statute also contains a provision entitled "Deposit of estimated antidumping duty under section 1673b(d)(1)(B) of this title," which provides as follows:

> If the amount of a cash deposit, or the amount of any bond or other security, required as security for an estimated antidumping duty under section 1673b(d)(1)(B) of this title is different from the amount of the antidumping duty determined under an antidumping duty order published under section 1673e of this title, then the difference *for entries of merchandise* entered, or withdrawn from warehouse, for consumption before notice of the affirmative determination of the Commission [ITC] under section 1673d(b) of this title is published shall be—
>
> (1) disregarded, to the extent that the cash deposit, bond, or other security is lower than the duty under the order, or
>
> (2) refunded or released, to the extent that the cash deposit, bond, or other security is higher than the duty under the order.

19 U.S.C.A. § 1673f(a) (West Supp. 1999) (emphasis added).

Plaintiff argues that the statutes, read together, require Commerce to compute two assessment rates, one for the "cap period" (the period from Commerce's preliminary determination through the publication of the ITC's affirmative final determination) and one for the period after publication of the ITC's affirmative injury determination.

B. Discussion

The court simply does not agree with plaintiffs' argument. 19 U.S.C.A. § 1673f(a) is a limitation on collection. It does not depend on the basic direction for deriving margins set forth in 19 U.S.C. § 1675(a)(2)(A).

In this case, plaintiff is disturbed because high margins relating to sales of merchandise entered during the cap period are part of the final average margin. It categorizes this as importing cap period duties to

post-cap entries. Putting aside the usual problem, which may or may not exist in this case, of matching sales and entries, Congress did not provide that dumping margins during the cap period in excess of the anticipated amount of dumping (i.e., amounts in excess of the preliminary finding of dumping) should be disregarded in their entirety. Rather, Congress provided that Commerce should disregard amounts in excess of the preliminary finding of dumping "for entries of merchandise" made during the cap period. *See* 19 U.S.C.A. § 1673f(a). Congress has also provided that the agency shall determine the dumping margin for "each such entry" during the period of review. 19 U.S.C. § 1675(a)(2)(A)(ii). The *Final Results* have complied with both of these provisions by determining dumping margins for each entry during the period of review but capping the assessed duties during the cap period at the amount of estimated antidumping duties.

Previously, this Court has held that Commerce's decision to determine the dumping margin by use of all sales during the period (even sales which occur during the cap period) "will not necessarily result in the violation of the statutory duty cap applicable to entries made between the preliminary less than fair value determination and the publication of the ITC's injury determination." *Ad Hoc Comm. of S. California Producers Of Gray Portland Cement v. United States*, 19 C.I.T. 1398, 1407–08, 914 F. Supp. 535, 545 (1995). In *Ad Hoc*, the plaintiff argued that the agency's decision to utilize all sales during the review period to determine the dumping margin violated 19 U.S.C. § 1673f(a). *Id.* at 1405, 914 F. Supp. at 543. The Court, however, saw no violation because the agency indicated "that it will instruct Customs to liquidate the relevant entries at a rate no higher than the cap, in accordance with 19 U.S.C. § 1673f(a) (1988)."[16] *Id.* at 1408, 914 F. Supp. at 545.

Commerce explained in the *Final Results* that the adoption of separate assessment rates "would raise concerns about possible manipulation of data to avoid AD duties and unrestrained dumping of certain merchandise subject to an order." *Final Results*, 63 Fed. Reg. at 7,394. Furthermore, the cash deposits on entries during the cap and post-cap periods are simply estimates of dumping liability. The actual assessment of antidumping duties is calculated in an administrative review under 19 U.S.C. § 1675(a) after Commerce reviews actual sales data for the period in question. Under 19 U.S.C. § 1675(a), there is no prohibition against reviewing actual sales data on entries made during the cap period.

As held in *Ad Hoc*, 19 CIT at 1408, 914 F. Supp. at 545, Commerce's determination to use one assessment rate and to instruct Customs to cap the assessment comports with the statute. Because the court finds no effort to segregate cap and post-cap entries is necessary, the issue of

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[16] The only change made to 19 U.S.C. § 1673f(a), by amendment in 1996, was the replacement of the words "cash deposit" for "cash deposit, bond, or other security." *Compare* 19 U.S.C. § 1673f(a) (1988) *with* 19 U.S.C.A. § 1673f(a) (West Supp. 1999).

whether MFI and MIC, basically the pre- and post-cap period affiliates, should receive separate assessment rates is mooted.

CONCLUSION

This matter is remanded for Commerce to reconsider the following issues: 1) the assessment rate for entries made after the *Final Results*, 2) the matching of costs to sales on a fiscal year basis, 3) the date of sale, and 4) the CEP profit calculation. Remand results are due within 60 days. Objections thereto are due 20 days thereafter and responses 11 days thereafter.

(Slip Op. 99–43)

SKF USA INC. AND SKF INDUSTRIE S.P.A., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, TORRINGTON CO., DEFENDANT-INTERVENOR

Consolidated Court No. 97–01–00054–S1

Plaintiffs, SKF USA Inc. and SKF Industrie S.p.A. (collectively "SKF"), move for judgment on the agency record pursuant to Rule 56.2 of the Rules of this Court. Plaintiffs challenge certain aspects of the Department of Commerce, International Trade Administration's ("Commerce") final results, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 61 Fed. Reg. 66,472 (Dec. 17, 1996).

SKF claims that Commerce erroneously included in its dumping margin calculations SKF's zero-value U.S. transactions involving samples.

Held: This case is remanded to Commerce to exclude from SKF's U.S. sales database samples for which SKF received no consideration. Commerce's final determinations are sustained in all other respects.

(Dated May 13, 1999)

Steptoe & Johnson (Herbert C. Shelley and Alice A. Kipel) for plaintiffs, SKF USA Inc. and SKF Industrie S.p.A.

David W. Ogden, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Velta A. Melnbrencis*, Assistant Director); of counsel: *Mark A. Barnett*, Attorney-Advisor, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Stewart and Stewart (Terence P. Stewart, Wesley K. Caine, Geert De Prest and *Lane S. Hurewitz)* for defendant-intervenor, The Torrington Company.

OPINION

TSOUCALAS, *Senior Judge:* Plaintiffs, SKF USA Inc. and SKF Industrie S.p.A. (collectively "SKF"), move for judgment on the agency record pursuant to Rule 56.2 of the Rules of this Court. Plaintiffs challenge certain aspects of the Department of Commerce, International Trade Administration's ("Commerce") final results, entitled *Antifriction*

Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews, 61 Fed. Reg. 66,472 (Dec. 17, 1996) *("Final Results")*.

Specifically, SKF claims[1] that Commerce erroneously included sample transactions in SKF's U.S. sales database when calculating its dumping margin. SKF requests a remand so that sample transactions could be excluded from Commerce's calculations. Further, SKF argues that Commerce should be ordered to refund any antidumping duty overpayment assessed due to the inclusion of samples in SKF's U.S. sales database.

BACKGROUND

This case deals with shipments of antifriction bearings ("AFBs") from Italy sold in the United States during the period from May 1, 1993, through April 30, 1994.[2] Commerce published the preliminary results of the subject review on December 7, 1995. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Japan, Singapore, Sweden, Thailand, and the United Kingdom; Preliminary Results of Antidumping Duty Administrative Reviews, Partial Termination of Administrative Reviews, and Notice of Intent to Revoke Order*, 60 Fed. Reg. 62,817 (Dec. 7, 1995). On December 17, 1996, Commerce published the Final Results. *See* 61 Fed. Reg. 66,472.

DISCUSSION

The Court has jurisdiction over this matter under 19 U.S.C. § 1516a(a)(2) (1994) and 28 U.S.C. § 1581(c) (1994).

The Court must uphold Commerce's final determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). " It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd*, 894 F.2d 385 (Fed. Cir. 1990).

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[1] Initially, when filing this suit, SKF also challenged Commerce's treatment of certain allocated home market billing expenses. In particular, SKF challenged Commerce's method of calculating SKF's home market sales by accepting positive billing adjustments, increasing the dumping margin, while rejecting the corresponding negative adjustments, which would have decreased SKF's margin. In light of SKF's challenge of Commerce's determination in another case involving the same issue, SKF is not pursuing this claim in the instant matter involving antifriction bearings from Italy. Pl.'s Mem. Supp. Mot. J. Agency R. at 8. Accordingly, SKF's challenge of the billing adjustment is dismissed and Commerce is affirmed in this respect.

[2] The review at issue was initiated prior to January 1, 1995. Consequently, the applicable law is the antidumping statute as it existed prior to the amendments made by the Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4809 (1994). *See Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995).

A. *Transactions Not Supported by Consideration*

SKF argues that this case should be remanded to Commerce with instructions pursuant to *NSK Ltd. v. United States*, 115 F.3d 965 (Fed. Cir. 1997), to exclude SKF's zero-value U.S. transactions from the dumping margin calculations. Pl.'s Mem. Supp. Mot. J. Agency R. at 5.

Commerce agrees a remand under *NSK* is proper and that it should exclude sample transactions for which no consideration was given in its computation of SKF's U.S. sales. Def.'s Partial Opp'n to Mot. J. Agency R. at 2.

Torrington argues that SKF failed to demonstrate that the transactions in question lacked "consideration" as defined by *NSK*. Torrington's Opp'n to Mot. J. Agency R. at 5, 7. In the alternative, Torrington argues SKF failed to provide sufficient record evidence to demonstrate that the "sample" transactions were in fact made outside the "ordinary course of trade," as required by statute. *Id.* at 10. Therefore, Torrington argues that Commerce should be affirmed or that the matter should be remanded to Commerce to obtain additional data regarding the U.S. sample transactions. *Id.*

Commerce is required to impose antidumping duties upon merchandise that "is being, or is likely to be, *sold* in the United States at less than its fair value." 19 U.S.C. § 1673(1) (1988) (emphasis added). A sale requires both a transfer of ownership to an unrelated party and consideration. *NSK*, 115 F.3d at 975. In other words, a transaction that involves no consideration is not a sale. Therefore, the distribution of AFBs for no consideration falls outside the purview of 19 U.S.C. § 1673. Consequently, the Court remands to Commerce to exclude from SKF's U.S. sales database those transactions that were not supported by consideration, and to adjust the dumping margins accordingly.

B. *Refund of Excess Duty*

Commerce calculates an antidumping duty by comparing an imported product's price in the United States to the foreign market value ("FMV") of comparable merchandise. The antidumping duty is the amount by which the merchandise's FMV exceeds its United States Price ("USP"). *See, e.g., Asociacion Colombiana de Exportadores de Flores v. United States*, 22 CIT ____, ____, 6 F. Supp.2d 865, 872 (1998); 19 U.S.C. § 1673.

In this case, Commerce agreed to a remand so that it could exclude from SKF's U.S. sales database those transactions for which SKF received no consideration. Upon exclusion of these transactions from the USP calculations, Commerce will recalculate the dumping margins accordingly.

SKF requests that this Court order Commerce to refund the amount of estimated antidumping duty deposits collected in excess of the lawful amount, with interest. *See* SKF's Proposed Order at 2. Although Commerce has agreed to recalculate the dumping margins on remand by excluding U.S. zero-priced transactions from SKF's U.S. sales figures, Commerce maintains that it lacks the authority to refund the excess

duty deposits as requested by SKF. Def.'s Partial Opp'n to Mot. J. Agency R. at 2.

This Court agrees with Commerce. By statute, it is the Customs Service that has the authority to "collect any increased or additional duties due or refund any excess of duties deposited as determined on a liquidation[3] or reliquidation." 19 U.S.C. § 1505(b). Commerce is only authorized to determine the dumping margin for each entry reviewed and to issue liquidation instructions to the Customs Service containing the amounts of antidumping duties due or rates at which antidumping duties should be assessed upon entries of merchandise covered by an administrative review. 19 U.S.C. § 1675(a). Consequently, this Court's remand to Commerce to exclude zero-priced transactions from SKF's U.S. sales database ensures all the relief to which SKF is entitled in accordance with this opinion.

CONCLUSION

The Court remands this case to Commerce to exclude transactions for which SKF received no consideration from the margin calculations. Commerce is affirmed in all other respects.

(Slip. Op. 99–44)

HYUNDAI ELECTRONICS CO., LTD. AND HYUNDAI ELECTRONICS AMERICA, INC., PLAINTIFFS, AND LG SEMICON CO., LTD. AND LG SEMICON AMERICA, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND MICRON TECHNOLOGY, INC., DEFENDANT-INTERVENOR

Consolidated Court No. 97–08–01409

[Plaintiffs' Motions for Judgment on the Agency Record, contesting a U.S. Department of Commerce decision not to revoke an antidumping duty order, are denied.]

(Dated May 19, 1999)

Powell, Goldstein, Frazer & Murphy LLP (Lawrence R. Walders) for plaintiffs Hyundai Electronics Co., Ltd., and Hyundai Electronics America, Inc.

Kaye, Scholer, Fierman, Hays & Handler, LLP (Michael P. House, Raymond Paretzky, and *R. Will Planert),* for plaintiffs LG Semicon Co., Ltd., and LG Semicon America, Inc.

David W. Ogden, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Kenneth S. Kessler);* Office of the Chief Counsel for Import Administration, United States Department of Commerce *(Duane W. Layton),* of counsel, for defendant.

Hale & Dorr, LLP (Gilbert B. Kaplan, Michael D. Esch, Paul W. Jameson, and *Cris R. Revaz),* for defendant-intervenor Micron Technology, Inc.

OPINION

GOLDBERG, *Judge:* In this action, the Court reviews a decision by the U.S. Department of Commerce ("Commerce") not to revoke an outstanding antidumping ("AD") order on dynamic random access memory

[3] Liquidation is the "final computation of ascertainment of the duties or drawback accruing on an entry" of merchandise. 19 C.F.R. § 159.1 (1998).

semiconductors ("DRAMs") from Korea. Plaintiffs, LG Semicon Co., Ltd. and LG Semicon America, Inc. (collectively "LG Semicon"), and Hyundai Electronics Co., Ltd. and Hyundai Electronics America, Inc. (collectively "Hyundai"), are Korean producers of the subject merchandise and seek relief from Commerce's action under USCIT Rule 56.2. During the underlying administrative proceeding, plaintiffs separately asserted that the regulatory requirements for revocation had been met, and requested that Commerce revoke the outstanding AD order. Commerce rejected each invitation in its *Notice of Final Results of Antidumping Duty Administrative Review: Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea*, 62 Fed. Reg. 39,809 (July 24, 1997) *("Final Results")*. Plaintiffs contest this determination as both contrary to law and unsupported by substantial evidence.

The Court exercises jurisdiction to review the motions for judgment on the agency record pursuant to 28 U.S.C. § 1581(c) (1994). The Court sustains the *Final Results*.

I.

BACKGROUND

Micron Technology, Inc. ("Micron"), a U.S. manufacturer of DRAM semiconductors, filed a petition with Commerce in April, 1992, alleging that Korean producers were selling DRAMs in the United States at less than fair value. Following an antidumping investigation, Commerce published an AD order on DRAMs from Korea in May, 1993. *See* 58 Fed. Reg. 27,520 (May 10, 1993).

In the first anniversary month of the AD order, plaintiffs and Micron both requested an administrative review. Commerce found *de minimis* dumping margins for both plaintiffs in this review. *See Notice of Final Results of Antidumping Administrative Review of DRAMs from the Republic of Korea*, 61 Fed. Reg. 20,216 (May 6, 1996).[1] In the second anniversary month, the parties requested another administrative review, and Commerce again found *de minimis* dumping margins for both LG Semicon and Hyundai. *See Notice of Final Results of Antidumping Administrative Review of DRAMs from the Republic of Korea*, 62 Fed. Reg. 965 (Jan. 7, 1997).[2]

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[1] In January, 1998, this Court remanded to Commerce one aspect of the first review that impacts LG Semicon. *See Micron Tech., Inc. v. United States*, No. 99–12 (CIT Jan. 28, 1999). Commerce filed its remand results on March 31, 1999. Although the Court has yet to take action on this remand determination, the Court notes that Commerce again found LG Semicon's margins *de minimis*.

[2] As with the first administrative review, this Court remanded to Commerce one aspect of the second administrative review pertaining to LG Semicon. *See Micron Tech., Inc. v. United States*, No. 99–29 (CIT Mar. 25, 1999). As a result of Commerce's decision on remand, it is foreseeable that LG Semicon's margins for the second review period will exceed *de minimis* levels. If this is the case, then LG Semicon will not have had *de minimis* dumping margins for three consecutive years, the first of three criteria for revocation, *see* 19 C.F.R. § 353.25(a)(2), and its arguments on appeal will become moot. The remand results for the second review will not become final, however, until the Court sustains the results and until the time for appeal has run. In addition, no party to this action has moved to stay these proceedings to await Commerce's remand findings. And, the Court notes that stays pending an appeal or other judicial proceeding are an "extraordinary and disfavored measure." *See Gerald Metals, Inc. v. United States*, 22 CIT ___, ___, 27 F. Supp.2d 1351, 1354 n.6 (1998) (citing *Phillip Bros. v. United States*, 10 CIT 448, 453, 640 F. Supp. 261, 265 (1986)). Thus, notwithstanding that LG Semicon's suit potentially could become moot, at this time it presents a genuine controversy. Therefore, the Court issues this opinion with respect to LG Semicon as well as Hyundai (to which the potential problem does not apply).

In the third anniversary month of the order, plaintiffs requested both a third annual review and a revocation in part of the AD order, pursuant to 19 C.F.R. § 353.25(a)(2) of Commerce's regulations. *Notice of Initiation of Administrative Review: DRAMs from Korea*, 61 Fed. Reg. 32,771 (June 25, 1996) (covering the period May 1, 1995 through April 30, 1996). In pertinent part, section 353.25(a)(2) provides that Commerce may revoke an order if it concludes that

> (i) One or more producers or resellers covered by the order have sold the merchandise at not less than foreign market value for a period of at least three consecutive years;
> (ii) It is not likely that those persons will in the future sell the merchandise at less than foreign market value; and
> (iii) * * * the producers or resellers agree in writing to their immediate reinstatement in the order, as long as any producer or reseller is subject to the order, if the Secretary concludes * * * that the producer or reseller, subsequent to the revocation, sold the merchandise at less than foreign market value.

19 C.F.R. § 353.25(a)(2) (1996).[3]

Commerce issued the preliminary results of its third review on March 18, 1997. *See Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent Not to Revoke Order: Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea*, 62 Fed. Reg. 12,794 (Mar. 18, 1997). Commerce again found *de minimis* dumping margins for both plaintiffs during the third review period. Commerce preliminarily determined not to revoke the AD order, however, because in its view plaintiffs each failed to meet the second of the three revocation criteria. That is, plaintiffs failed to satisfy Commerce that they were "not likely" to dump in the future. Commerce based its preliminary determination in part on evidence submitted by Micron regarding market trends during 1996. Importantly, Micron's data included information for the period after April 30, 1996, i.e., the last day covered under the third administrative review. In the *Final Results*, Commerce affirmed its decision not to revoke the AD order. *See* 62 Fed. Reg. at 39,811.

Plaintiffs challenge Commerce's decision not to revoke the order, alleging that it was neither in accordance with law nor supported by substantial evidence. More specifically, both plaintiffs assert that, as a matter of law, Commerce did not apply the proper standard to determine the likelihood of future dumping nor did it use data from an appropriate time period when it applied its faulty standard. Hyundai further chal-

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[3] Because Commerce initiated the third review after January 1, 1995, the agency conducted the review under the antidumping law as amended by the Uruguay Round Agreements Act ("URAA"). Pub. L. No. 103-465, tit. II, 108 Stat. 4808, 4842 (1994). Among other things, the URAA revised certain terminology, including substituting the term "normal value" for the term "foreign market value." Yet, at the time Commerce initiated the third review in June, 1996, Commerce's revised regulations, intended to reflect the URAA amendments, had yet to take effect. *See Notice of Final Rule: Antidumping and Countervailing Duties*, 62 Fed. Reg. 27,296 (May 19, 1997) (noting that June 18, 1997 was the effective date of the new regulations). Therefore, the 1996 regulations in effect during the underlying proceeding employed the pre-URAA terminology, i.e., "foreign market value," and that language is used throughout this opinion. Also, all parties to the action concede that the URAA did not alter the revocation statute nor did Commerce alter the substantive criteria in its revocation regulation. Currently, the regulation that governs revocation may be found at 19 C.F.R. § 351.222(b)(2) (1998).

lenges Commerce's characterization of the DRAM market and of Hyundai's behavior in that market as inconsistent with the record evidence. LG Semicon also challenges various conclusions regarding LG Semicon's current and future activities in the DRAM market as unsupported by record evidence.

Commerce opposes all of plaintiffs' challenges, as does Micron.

II.

STANDARD OF REVIEW

Commerce's determination will be sustained if it is supported by substantial evidence on the record and is otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B) (1994).

To determine whether Commerce's interpretation of the statute is in accordance with law, the court applies the two-prong test set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* first directs the court to determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842–43 (internal quotations omitted). In doing so, the court must inquire "whether Congress's purpose and intent on the question at issue is judicially ascertainable." *Timex V.I., Inc. v. United States*, ___ Fed. Cir. (T) ___, ___, 157 F.3d 879, 881 (1998) (citing *Chevron*, 467 U.S. at 842–43 & n.9); *see also Micron Tech., Inc. v. United States*, No. 99–12, slip op. at 4–5 (CIT Jan. 28, 1999). Congress's purpose and intent must be divined using the traditional tools of statutory construction. *Timex*, 157 F.3d at 882 (citation omitted). Of course, the "first and foremost tool to be used is the statute's text," and "if the text answers the question, that is the end of the matter." *Id.* (citations and internal quotation omitted). In addition to the plain language of the statute, the other tools include the statute's structure, canons of statutory interpretation, and legislative history. *See id.* (citing *Dunn v. Commodity Futures Trading Comm'n*, 117 S.Ct. 913, 916–20 (1997)); *Chevron*, 467 U.S. at 859–63; *Oshkosh Truck Corp. v. United States*, 123 F.3d 1477, 1481 (Fed. Cir. 1997)). If, using these tools, Congress's intent is unambiguous as to the issue at hand, the court must give effect to that intent.

On the other hand, if Congress's intent is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. Thus, the second prong of the *Chevron* test directs the court to consider the reasonableness of an agency's interpretation.

If asked to review Commerce's factual findings, the court will uphold the agency if its findings are supported by substantial evidence. "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd*, 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987). In applying this standard, the court sustains Commerce's factual determinations so long as they are reasonable and supported by the record as a whole, even if there is some

evidence that detracts from the agency's conclusions. *See Atlantic Sugar, Ltd. v. United States*, 2 Fed. Cir. (T) 130, 138, 744 F.2d 1556, 1563 (1984).

III.

DISCUSSION

In the discussion below, the Court first reviews plaintiffs' argument that Commerce's application of the "not likely" standard was not in accordance with law. The Court then considers plaintiffs' claim that Commerce unlawfully examined an inappropriate time period to make its "not likely" determination. In both instances, the Court rejects plaintiffs' arguments. The Court concludes its discussion by considering plaintiffs' claims that Commerce's decision not to revoke the order was unsupported by substantial evidence. Here, too, the Court sustains Commerce's determination.

A. *"Not Likely" Standard*

Plaintiffs first argue that Commerce applied an improper standard to determine whether plaintiffs were "not likely" to dump in the future. Each plaintiff advances a different theory, however. Hyundai contends that since Commerce adopted 19 C.F.R. § 353.25(a)(2)(ii) in 1989, the agency has granted revocation in virtually every case where a respondent has established three consecutive years of no dumping and has furnished the required agreements. *See* Pl.'s (Hyundai's) Br. in Supp. of Mot. for J. on Agency R. at 9 n.5 ("Hyundai's Br.") (citing fourteen determinations between 1990 and mid-1997 where Commerce granted revocation). Hyundai thus maintains that respondents who meet these criteria should not be denied revocation barring extremely unusual circumstances, which it asserts do not exist in this case.

In addition, Hyundai argues that Commerce's final determination in this case imposes a nearly impossible standard for revocation of AD orders on merchandise sold in cyclical markets. Hyundai asserts that Commerce presumes market downturns in cyclical industries always lead to dumping. Specifically, Hyundai points to the *Final Results*, where Commerce stated that "[t]he DRAM industry is highly cyclical in nature with periods of sharp upturn and downturn in market prices," and then noted that "because DRAMs are currently a commodity product, DRAM producers/resellers must price aggressively during a downturn period in order to stay competitive and maintain their customer base." *Final Results*, 62 Fed. Reg. at 39,810. Commerce then went on to find that "it is reasonable to conclude that information regarding the selling activities and pricing patterns of the respondents, as well as other market conditions, during periods of significant downturn are relevant to whether dumping is not likely to occur in the future." *Id.* According to Hyundai, if the assumption that market downturns automatically lead to dumping is accepted, it will effectively make it impossible to revoke AD orders on products sold in cyclical markets because, by definition, there will be market downturns.

LG Semicon also challenges Commerce's use of the "not likely" standard in the instant case, although on different grounds. LG Semicon argues Commerce ignored the plain meaning of the regulation when it found LG Semicon did not meet the "not likely" criterion. LG Semicon asserts that future dumping is "not likely" if the chance that respondent will *not* dump in the future is greater than the chance that respondent *will* dump in the future. Therefore, LG Semicon contends Commerce should revoke an AD order if it finds at least a 51% chance that respondent will not dump in the future. And LG Semicon argues that, contrary to this proposed standard, Commerce applied a more rigorous test to ascertain whether it was "not likely" respondents would dump in the future. In doing so, LG Semicon maintains Commerce's decision was contrary to law.

The Court first addresses the standard under which these arguments are reviewed. In Section 751(c) of the Trade Agreements Act of 1979, Pub. L. No. 96–39, tit. I, § 101, 93 Stat. 144, 176 (1979), Congress provided that Commerce, as the administering authority, "may revoke, in whole or in part, a countervailing duty order or an antidumping duty order or finding, or terminate a suspended investigation, after [an administrative review]". *See* 19 U.S.C. § 1675(d)(1). Although Congress offered no further guidance to assess when revocation might be appropriate, Commerce has promulgated its own series of regulations to fulfill the statutory mandate.[4] In this case, neither plaintiff contends that section 353.25(a)(2) itself is at odds with the statute's intent. Rather, plaintiffs contest Commerce's application of the regulation. Thus, the Court must consider whether Commerce's actions were reasonable.

i. *Commerce is Not Automatically Required to Revoke an Antidumping Order Where Respondent Has Not Dumped for Three Consecutive Years and Has Furnished the Requisite Agreements.*

Hyundai maintains that except in extraordinary cases, Commerce should automatically revoke an AD order when respondent can show three years of no dumping and has furnished the required no-dumping agreements. This argument lacks merit. Hyundai's assertion ignores both the language of the statute and the regulation. First, the statute expressly states that Commerce "*may* revoke, in whole or in part, * * * an antidumping duty order." 19 U.S.C. § 1675(d)(1) (emphasis added). Similarly, the regulation provides that Commerce "*may* revoke an order in part" if the three criteria for revocation have been met. 19 C.F.R. § 353.25(a)(2) (emphasis added). The use of the word "may" affords Commerce the discretion not to revoke an order even if all three criteria are satisfied. Indeed, the court has held that the pre-1989 incarnation of the regulation, 19 C.F.R. § 353.54 (1988), which similarly stated that Commerce "may act to revoke" when certain conditions were met, indi-

[4] Commerce published its initial regulation to guide operation of the revocation statute in 1980. *See Final Rule: Antidumping Duties*, 45 Fed. Reg. 4932 (Feb. 6, 1980). Then, as noted earlier, Commerce issued revised regulations in 1989. *See supra* text accompanying note 3. The current regulation that governs revocation can be found at 19 C.F.R. § 351.222(b)(2).

cates that "Commerce is not compelled to grant revocation" even where plaintiffs satisfy the requirements. *Toshiba Corp. v. United States*, 12 CIT 455, 463, 688 F. Supp. 617, 623 (1988), *aff'd*, 7 Fed. Cir. (T) 13, 861 F.2d 257 (1988); *see also Tatung Co. v. United States*, 18 CIT 1137, 1144 (1994) (finding that the "second requirement for revocation, that the respondent is not likely to resume dumping, necessarily involves an exercise of discretion and judgment").

Second, the regulation plainly establishes a three-part test for revocation, not a two-part test. Contrary to Hyundai's argument, the second prong of the regulation, i.e., the "not likely" exercise, is an independent criterion that must be established to Commerce's satisfaction to attain revocation. Thus, the plain language of the statute and the regulation refutes Hyundai's argument that Commerce acted contrary to law when it denied revocation even though respondent established three consecutive years of no dumping and furnished the requisite agreements.

ii. *Commerce's Application of the "Not Likely" Standard Allows for the Possibility That an Outstanding Order on a Product Sold in a Cyclical Market May Be Revoked.*

Hyundai next asserts that Commerce's application of the "not likely" standard makes it impossible for an AD order to be revoked in a cyclical industry. The record and Commerce's past practice belie this argument. First, Commerce did not simply decide that because the DRAM industry is cyclical, Hyundai and LG Semicon are likely to dump in the future; rather, in its effort to predict whether resumption of dumping is not likely, Commerce examined the history of companies in the DRAM industry—and this industry only—to determine how those companies react to market downturns. It noted that

> [i]n the past, the DRAM industry has been characterized by dumping during periods of significant downturn. For instance, various foreign producers were found to have dumped in the mid-1980s, and the Korean respondents in this proceeding were found to have dumped in the less than fair value investigation during 1991–1992, the last period when there was a significant downturn in the DRAM industry.

Final Results, at 39,810 (citation omitted). Commerce then stated that "it is reasonable to conclude that information regarding the selling activities and pricing practices of respondents, *as well as other market conditions*, during periods of significant downturn are relevant to whether dumping is not likely to occur in the future." *Final Results*, at 39,810 (emphasis added). Importantly, some of the other market conditions Commerce considered were (1) spot pricing and company-specific pricing data for 1996 and 1997, (2) production and inventory data for 1996 and 1997, and (3) industry reports on the general health of the DRAM industry for both 1996 and 1997. *See Final Results*, at 39,817–19; *see also* discussion *infra* Section III.C (finding that Commerce's decision on this matter was based on substantial evidence). Thus, summary review of the *Final Results* demonstrates that Commerce did not base its "not

likely" decision on the mere fact that DRAMs are sold in a cyclical market. Rather, Commerce considered respondents' historical selling and pricing behavior in addition to other market conditions. Consequently, the record here does not support the conclusion that Commerce will automatically find future dumping is likely where there is a cyclical market.

Second, Commerce has, in at least one instance, revoked an AD order on products sold in a cyclical market. In *Frozen Concentrated Orange Juice from Brazil*, 56 Fed. Reg. 52,510 (Oct. 21, 1991), Commerce revoked an order even though the merchandise at issue was commodity based and sold in a highly cyclical market. In that case, Commerce identified three years of price fluctuations in a cyclical market but discerned no correlative trend between dumping and market downturns. *Id.* at 52,511. Thus, Commerce has revoked an AD order involving a cyclical industry in the past, and nothing in the instant case indicates that Commerce is precluded from doing so in the future.

iii. *The Plain Language of the Regulation Does Not Require Commerce to Use a Set Numerical Threshold to Assess Whether Future Dumping is "Not Likely."*

Turning to LG Semicon's argument, the Court finds that Commerce's application of the "not likely" standard did not contravene the regulation's plain language. LG Semicon maintains the phrase "not likely" requires Commerce to find a greater-than-fifty-percent chance that dumping will occur before it may deny a request for revocation. The Court does not agree. The "not likely" calculus is not a mathematical formula, but rather a fact-intensive, case-by-case determination. Within reason, Commerce has the discretion to apply the "not likely" standard as it deems fit. And, as Commerce points out, the proposed greater-than-fifty-percent standard would be difficult if not impossible to administer. In addition, the court has held that Commerce "need not affirmatively find that LTFV sales are likely[,] to be unsatisfied that there is no likelihood of LFTV sales." *Toshiba Corp. v. United States*, 15 CIT 597, 600 (1991).[5] In other words, even if Commerce cannot or does not find that LTFV sales are *likely* to occur, it can still, within its discretion, reject a respondent's claim that it is "not likely" to make LTFV sales in the future. Therefore, Commerce reasonably exercised its discretion when it applied the "not likely" standard in this case.

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[5] In 1989, Commerce substituted the phrase "not likely" for "no likelihood." 19 C.F.R. § 353.25(a)(2)(ii) (1989). Yet, the *Toshiba* case involved a pre-1989 revocation review and, hence, the phrase "no likelihood" instead of "not likely" was dispositive there. *See* 15 CIT at 600. When Commerce revised its regulation in 1989, Commerce gave no explanation for the change in phraseology; indeed, the agency has continued to use the two phrases interchangeably in its rulings. *See, e.g., Final Results*, 62 Fed. Reg. at 39,812–13; *see also Wieland-Werke v. United States*, 22 CIT ___, ___, 4 F. Supp.2d 1207, 1211 (1998) (holding that the phrases "no likelihood" and "not likely" have the same meaning in determining whether exporters will resume dumping). While the Court here has no occasion to revisit whether distinctions between the two phrases result in variant standards, to avoid confusion, the Court urges Commerce to refrain from using the "no likelihood" phrase in future revocation decisions when it means "not likely."

iv. *Commerce's "Not Likely" Requirement is Consistent With International Obligations.*

In ancillary fashion, LG Semicon contends that Commerce's "not likely" standard is at odds with U.S. international obligations.[6] Although not adequately addressed by the parties, this issue merits more than cursory analysis due in large measure to a World Trade Organization ("WTO") panel report that addressed the same question.[7]

When asked to review the same underlying administrative decision, a WTO dispute settlement panel recently found that Commerce's "not likely" requirement violates WTO rules. *See* WTO Dispute Panel Report: United States—Anti-Dumping Duty on DRAMs of One Megabit or Above from Korea, 1999 WL 38403 (WTO Jan. 29, 1999, *adopted* March 19, 1999) ("Korean DRAMs WTO Report"). Although the WTO panel rejected the "not likely" approach, it declined to suggest that the United States should act to revoke the Korean DRAMs order. Rather, the panel concluded that the United States has a "range of possible" options to implement its recommendation. Korean DRAMs WTO Report, 1999 WL 38403, at *151.

For purposes here, however, the salient point is that the WTO panel found the "not likely" standard inconsistent with Article 11.2 of the WTO's Agreement on Implementation of Article VI of the 1994 General Agreement on Tariffs and Trade (the "Antidumping Agreement"). Article 11.2 provides as follows:

> The authorities shall review the need for continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive antidumping duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be *likely* to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the antidumping duty is no longer warranted, it shall be terminated immediately.

Antidumping Agreement, art. 11.2 (emphasis added). In essence, the WTO panel concluded that the "not likely" approach results in a more rigorous standard for respondents than the "likely" approach embodied

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[6] In a footnote to its principal brief, LG Semicon argued that Commerce violated U.S. international obligations through its application of the "not likely" standard. *See* Pl.'s (LG Semicon's) Br. in Supp. of Mot. for J. on Agency R. at 14 n.4 ("LG Semicon's Br."). For its part, Hyundai only alludes to U.S. international obligations in its principal brief when it argues that Commerce's alleged policy of automatic revocation after three years of no dumping is consistent with its international obligations. *See* Hyundai's Br. at 9. Only in its reply brief does Hyundai make the express claim that Commerce's "not likely" standard is inconsistent with international obligations—and even then it does so in just one sentence. *See* Pl.'s (Hyundai's) Reply Br. in Supp. of Mot. for J. on Agency R. at 6.

[7] Although the WTO issued its report after the briefing period concluded in the case at bar, no party moved to file supplemental briefs. Nevertheless, the Court takes judicial notice of the fact that the WTO panel published a report examining the same issue because it is particularly relevant to the scope of U.S. international obligations.

in Article 11.2. Korean DRAMs WTO Report, 1999 WL 38403, at *141. More precisely, the panel reasoned as follows:

> 6.45 We consider that a failure to find that an event is "not likely" is not equivalent to a finding that the event is "likely." We see a clear conceptual difference between establishing something as a positive finding, and failing to establish something as a negative finding. It is perfectly possible that one could not determine that someone was unlikely to dump and find that they were also likely to dump. But the former determination does not, in and of itself, amount to a demonstrable basis for concluding the latter. This is evident from the fact that the former finding is manifestly compatible also with the reverse of the latter situation, i.e., it is perfectly logical to find that you cannot determine that someone is unlikely to dump, yet also be unable to determine that they were actually likely to dump. In other words, determining something is not "not likely" is entailed by, but does not itself entail, that something is likely.
>
> 6.46 * * *.
>
> 6.47 Given this reality, it is a priori possible that situations could arise where the not "not likely" criterion is satisfied but where the likelihood criterion is not satisfied. Reliance on the not likely criterion clearly fails to provide any reliable means to avoid or preclude this flaw. Given such a fundamental flaw, it cannot constitute a demonstrable basis for consistently and reliably determining that the likelihood criterion is satisfied.

Korean DRAMs WTO Report, 1999 WL 38403, at *141–42.

As an initial matter, the WTO report itself has no binding effect on the court. In *Footwear Distributors and Retailers of America v. United States*, 18 CIT 391, 852 F. Supp. 1078 (1994), the court was confronted with a claim that an adopted GATT panel decision should govern the outcome of the case. Upon thorough review, the *Footwear Distributors* court reasoned that the response to a panel report is the prerogative of the executive branch, not the judiciary, because it implicates political decisions. *Id.* at 414, 852 F. Supp. at 1096. "[T]he courts traditionally refrain from disturbing the 'very delicate, plenary and exclusive power of the [executive] as the sole organ of the federal government in the field of foreign relations.'" *Id.* (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)). The *Footwear Distributors* court therefore concluded that "[h]owever cogent the reasoning of the GATT panel[]" judicial relief from this court does not attach. *Id.*

While *Footwear Distributors* concerned an adopted GATT panel report, the same principles apply to the WTO report at issue here. Most importantly, Congress made this clear when it codified the principles espoused in *Footwear Distributors* as part of the URAA. Specifically, Congress provided that the response to an adverse WTO panel report is the province of the executive branch and, more particularly, the Office of the U.S. Trade Representative. *See* URAA § 129 (codified as 19 U.S.C. § 3538). Thus, the WTO panel report does not constitute binding precedential authority for the court. Of course, this is not to imply that a panel

report serves no purpose in litigation before the court. To the contrary, a panel's reasoning, if sound, may be used to inform the court's decision.

The Antidumping Agreement, on the other hand, is a different matter. When it enacted the URAA, the Senate noted that the Uruguay Round Agreements, including the Antidumping Agreement, "are not self-executing and thus their legal effect in the United States is governed by implementing legislation." S. Rep. No. 103–412, at 13 (1994); *accord* H.R. Rep. No. 103–826, pt. I, at 25 (1994). Nevertheless, as a signatory to the Uruguay Round agreements, the United States has obligations under these agreements irrespective of whether the agreements are self-executing. *See Federal-Mogul Corp. v. United States*, ___ Fed. Cir. (T) ___, ___, 63 F.3d 1572, 1581 (1995) (noting that GATT agreements, including the Uruguay Round agreements, are international obligations); *Footwear Distribs.*, 18 CIT at 410, 852 F. Supp. at 1093 (same). Indeed, the Statement of Administrative Action to the URAA, H.R. Doc. No. 103–316 (1994), at 669, provides that the URAA was "intended to bring U.S. law fully into compliance with U.S. obligations under [the Uruguay Round] agreements." Accordingly, the Antidumping Agreement is properly construed as an international obligation of the United States.

When confronted with a conflict between an international obligation and U.S. law, it is of course true that an unambiguous statute will prevail over the international concern. *See, e.g., Federal-Mogul*, ___ Fed. Cir. (T) at ___, 63 F.3d at 1581; *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 10 Fed. Cir. (T) 74, 83, 966 F.2d 660, 668 (1992). Yet, absent express language to the contrary, a statute should not be interpreted to conflict with international obligations. This time-honored canon of statutory construction was first applied by Chief Justice Marshall in *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

> It has also been observed that an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.
>
> These principles are believed to be correct, and they ought to be kept in view in construing the act now under consideration.

Id. at 118; *see also Federal-Mogul*, ___ Fed. Cir. (T) at ___, 63 F.3d at 1581; *Footwear Distribs.*, 18 CIT at 408, 852 F. Supp. at 1091. And, *Chevron* must be applied in concert with the *Charming Betsy* doctrine when the latter doctrine is implicated. *See DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 574–75 (1988).

Here, Congress was silent on the mechanics of the revocation procedure. Commerce acted to fill the void and, in doing so, promulgated the "not likely" requirement. Meanwhile, as described earlier, Article 11.2 of the Antidumping Agreement also outlines procedures for revocation and provides that, in deciding whether to revoke an outstanding order, a

signatory may consider whether dumping is "likely to continue or recur if the duty were removed." Because Congress declined to enact procedures for revocation, under the *Charming Betsy* doctrine, the Court must consider whether Commerce formulated its regulation consistent with Article 11.2 of the Antidumping Agreement.

Commerce fulfilled its statutory mandate in consonance with U.S. international obligations. As a general matter, Article 11.2 of the Antidumping Agreement provides the administering authority discretion to determine whether revocation is appropriate. *See* Antidumping Agreement, art. 11.2 (stating that "*[i]f*, * * *, the authorities determine that the antidumping duty is no longer warranted, it shall be terminated immediately" (emphasis added)). It follows that the administering authority also has discretion to determine whether injurious dumping would be "likely" to occur in the future. And, as the WTO panel aptly noted,

> the certainty inherent to such a prospective analysis could be conceivably somewhat less than that attached to purely retrospective analysis * * *. this reflects the fact that the necessity involved in Article 11.2 is not to be construed in some absolute and abstract sense, but as that appropriate to circumstances of practical reasoning intrinsic to a review process. Mathematical certainty is not required, but the conclusions should be demonstrable on the basis of the evidence adduced.

Korean DRAMs WTO Report, 1999 WL 38403, at *140–41. In short, an analysis of whether dumping is "likely" or "not likely" to occur in the future is inherently predictive. As a result, operationally, Article 11.2 provides that an administering authority has considerable discretion to make an inherently predictive analysis.

The Court concedes that "it is a priori possible that situations could arise where the not 'not likely' criterion is satisfied but where the likelihood criterion is not satisfied." Korean DRAMs WTO Report, 1999 WL 38403, at *142. And, therefore, there is not perfect overlap between the two standards. Yet, the discretion afforded to predict the state of future dumping erases any clear conflict between the two approaches. Indeed, the Court is satisfied that, as applied, the discretionary authority to make such a predictive analysis must result in general overlap between the two approaches. So viewed, unless the conflict between an international obligation and Commerce's interpretation of a statute is abundantly clear, a court should take special care before it upsets Commerce's regulatory authority under the *Charming Betsy* doctrine. In sum, Commerce's "not likely" requirement is consistent with U.S. international obligations and, more specifically, its obligation under Article 11.2 of the Antidumping Agreement.

B. *Gap Period*

Plaintiffs next argue that Commerce based its "not likely" decision on data culled from an inappropriate time period. Specifically, plaintiffs contend that, in making its "not likely" determination, Commerce's review of data from the period after the last day of the review period until

the publication date of the *Final Results*, i.e., April 30, 1996 until July, 1997, was not in accordance with law. Plaintiffs maintain that Commerce's action in this respect resurrects the so-called "gap-period" review, a procedure expressly eliminated by Commerce when it issued revised regulations in 1989.

Before 1989, an AD order might have been revoked after only two consecutive years of zero or *de minimis* dumping margins. *See* 19 C.F.R. § 353.54(b) (1988). But, before a final decision on revocation could be issued, the regulations also required an additional administrative review of sales made during the "gap period"—the day after the second review period until the date the preliminary results for the revocation decision were published. *Id.* Because an indeterminate publication date, rather than a regulatory deadline, governed the length of the "gap period," a review of sales made during the "gap period" might cover a period ranging from nine months up to several years.[8] Also, a "gap-period" review proceeded much like a traditional administrative review in that questionnaires were issued, responses were submitted, and even verifications were conducted. If, after the review, Commerce found no dumping in the "gap period" and all other criteria were satisfied, the agency then could exercise its discretion to revoke the order.

In 1989, Commerce revised its revocation regulation and specifically acted to excise the "gap-period" review. Rather than forcing a respondent to demonstrate no dumping for an indeterminate "gap period," Commerce increased the number of consecutive years of zero or *de minimis* dumping from two to three. *See* 19 C.F.R. § 353.25(a)(2)(i) (1989). In doing so, Commerce explained that

> the adoption of a three-year period for revocation or termination based on the absence of dumping does not substantially modify the period of time that must be examined under the current regulations. * * * The adoption in §353.25(c)(3) of the day after the end of the three-year period as the effective revocation date *eliminates the need for an examination of the gap period.*

Notice of Final Rule: Antidumping Duties, 54 Fed. Reg. 12,742, 12,757–58 (Mar. 28, 1989) (emphasis added).

Plaintiffs generally argue that in its review of May to December, 1996 data, Commerce did more than simply assess whether the future occurrence of dumping was "not likely." Instead, plaintiffs claim Commerce effectively required the companies to demonstrate the absence of dumping after the third period of review and, in so doing, resurrected the "gap-period" review. Also, plaintiffs contend the phrase "not likely that [respondents] will in the future" make LTFV sales, 19 C.F.R. § 353.25(a)(2)(ii), only allows for review of those events that might occur after a revocation notice is published, not those events that occur immediately after the close of the third review period. Plaintiffs thus

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[8] *See generally* L. Shambon, *Revocation Under the Antidumping and Countervailing Duty Law?: You Should Live So Long!*, The Practicing Law Institute, Vol. 2, 241, 293 & n.52 (1987) (noting that while the "gap period" lasted at least nine months, Commerce's "gap-period" reviews covered on average fifteen months).

maintain Commerce erred when it considered the May to December, 1996 data because "in the future" mandates a prospective analysis of events that might occur after the date of publication, which in this case was July, 1997.

Plaintiffs' arguments are unpersuasive. Under the current regulation, it is true that respondents need to establish only three years of no dumping to satisfy the first criteria. By eliminating the "gap-period" review, Commerce effected this change. Yet, it does not follow that because Commerce reviewed the May to December, 1996 data in making its "not likely" determination, Commerce required plaintiffs to prove an absence of dumping. Commerce did not issue questionnaires, require responses, conduct a verification, or calculate a dumping margin for sales made during the May to December period. Thus, Commerce simply did not conduct an administrative review or a quasi-review of May to December, 1996 sales and, hence, did not resurrect the "gap-period" review.

In addition, while Commerce may not conduct a typical full review of post-POR sales as part of its "not likely" analysis, nothing in section 353.25(a)(2)(ii) proscribes its analysis to a review of projected trends in the period afer publication of the revocation notice. Commerce may use post-POR data, as well as analysis of post-revocation models, to assess whether future dumping is "not likely." Commerce has discretion to decide which data it will use to assess whether future dumping is "not likely." In sum, Commerce's decision to review post-POR and pre-revocation notice data was in accordance with law.

C. *Substantial Evidence Supports Commerce's Decision.*

Plaintiffs point to a host of evidentiary flaws in Commerce's decision and claim that, on the whole, the decision is not supported by substantial evidence. More specifically, plaintiffs identify eight alleged defects in support of their claim: (1) both plaintiffs contend Commerce's reliance on below-cost sales for the May and June, 1996 period to support its "not likely" decision is unsupported by the record evidence; (2) both plaintiffs contend Commerce's reliance on spot-pricing data as evidence of future dumping is misplaced and runs counter to company-specific pricing and cost data; (3) Hyundai contends Commerce ignored crucial evidence showing that the DRAM industry improved in 1997; (4) Hyundai contends the record does not show that production levels and inventory levels were increasing; (5) Hyundai contends Commerce ignored evidence that it had no incentive to dump in the U.S. market because it was building a DRAM facility in the United States; (6) LG Semicon contends it had no incentive to dump in the future because its U.S. market share is so small; (7) LG Semicon contends Commerce failed to consider crucial exchange rate data that indicates LG Semicon was "not likely" to dump in the future; and, finally, (8) both plaintiffs contend Commerce ignored the fact that the companies were willing to participate in a data collection program to dispel the notion that future dumping might occur. The Court considers each argument posed by plaintiffs in turn below and

holds that, while other conclusions might easily be drawn from the record, Commerce's determination is nevertheless supported by substantial evidence.

i. *Commerce's Reliance on May and June 1996 Data Indicating Sales Below Cost is Supported By Substantial Evidence.*

In the *Final Results*, Commerce examined cost data submitted by the parties as part of the third administrative review. Included in this data was information for the two shoulder months immediately following the close of the third review period, i.e., May and June, 1996. Commerce decided to use this data for its revocation analysis. In doing so, Commerce found that both respondents made "a substantial number of home market sales [] at prices below [cost of production] during [the] two months immediately following the close of the third administrative review." *Final Results*, at 39,817. Commerce stated that the existence of below-cost home market sales in May and June, 1996 "is suggestive of deteriorating market conditions that often give rise to dumping." *Id.*

Plaintiffs point out that the statute only allows Commerce to disregard below-cost sales when calculating the dumping margin if they (1) have been made within an extended period of time in substantial quantities, and (2) were not at prices which permit recovery of all costs within a reasonable period of time. *See* 19 U.S.C. § 1677b(b)(1). And, the statute defines an extended period of time as "a period that is normally 1 year, but not less than 6 months." 19 U.S.C. § 1677b(b)(2)(B). Because the sales at issue plainly were not made over an extended period of time, plaintiffs maintain that the May and June, 1996 data cannot be used to support Commerce's revocation decision.

The Court agrees in part. Plaintiffs are correct in noting that for purposes of calculating a dumping margin, more than two months of below-cost sales are needed before such sales may be disregarded. Commerce even concedes as much in the *Final Results*:

> We note that, according to the Department's cost test methodology, these below cost sales were not sufficiently numerous for the Department to reject as a basis for determining normal value in the third review. We also agree with LGS that whether it made home market sales at prices below COP during the two months immediately following the close of the third review period in and of itself does not demonstrate that dumping occurred.

Final Results, at 39,817. Thus, standing alone, below-cost sales made over a limited time period cannot amount to substantial evidence that a respondent will engage in future dumping. *See, e.g., Steel Wire Rope from Korea*, 62 Fed. Reg. 17,171, 17,174 (Apr. 9, 1997) (finding that evidence of below-cost sales alone did not support petitioner's claim that LTFV sales were likely to be made in the future). Yet, as discussed earlier, Commerce has discretion to decide which data it will use to make its "not likely" determination. While the Court agrees that below-cost sales over a limited period alone are not indicative of future dumping, Commerce may, in its discretion, use such data as one factor among several to

guide its "not likely" decision. Consequently, the Court finds that the May and June, 1996 below-cost sales, in conjunction with other factors, constitutes substantial evidence to support a "not likely" determination.

ii. *Commerce's Finding that the Submitted Pricing and Cost Data is Indicative of Future Dumping is Supported by Substantial Evidence.*

Plaintiffs next contend that Commerce misconstrued and ignored the submitted pricing and cost data to such an extent that the "not likely" determination is not based on substantial evidence. Both plaintiffs critique Commerce's analysis of spot and actual prices and contend the data show that future dumping is not likely. In addition, plaintiffs generally claim that Commerce improperly rejected some cost data, then inexplicably accepted other cost figures such that its price-to-cost comparisons were fundamentally skewed.

More specifically, plaintiffs claim Commerce's reliance on spot-pricing data is misplaced because these prices did not reflect contract prices to large U.S. original equipment manufacturers ("OEMs"), which represented a significant portion of respondents' U.S. sales. According to Hyundai, Commerce also failed to give adequate weight to its submitted cost data. In particular, Hyundai points to an economist's report it presented to Commerce during the review, illustrating that in all scenarios 16M DRAM prices would exceed Hyundai's costs by substantial margins in 1997 and 1998. *See* Hyundai's Letter to DOC Transmitting Case Brief (Apr. 21, 1997), Ex. 2, P.R. Doc. No. 121 ("Hyundai's DOC Br.") (attaching an April 1997 report of Dr. Kenneth Flamm entitled "Economic Analysis of 16 Megabit DRAM Cost and Pricing: Projections for 1997 and 1998"). Hyundai argues that the econometric forecasts noted in Dr. Flamm's report were based on conservative assumptions, and Commerce gave insufficient credence to the report. Hyundai also notes that Commerce's price-to-cost comparison was flawed in part because it compared the average price for all types of one DRAM model with the cost of only one type within that model. Hyundai maintains these combined defects in Commerce's analysis render its decision unsupported by substantial evidence.

Similarly, LG Semicon notes that, as part of the third review, Commerce verified that LG Semicon's actual prices during May and June, 1996 were higher than U.S. spot prices for the same period. Furthermore, LG Semicon argues the record shows that its actual prices—typically based on contract prices that lagged far behind the declining spot market—remained above its own declining costs of production throughout the downturn. *See* LG Semicon's Br. at 29. And, contrary to Commerce's finding, LG Semicon insists that its submitted data, showing declining costs in the second half of 1996, were reliable. Finally, LG Semicon points out that even though DRAM prices were declining rapidly from January to April, 1996, Commerce found plaintiffs did not engage in dumping during this period.

Plaintiffs claims have merit. Indeed, it is fair to say that one could reasonably find respondents were not likely to dump in the future based on the record evidence. Yet, it is not for the Court to reweigh the evidence; rather, the Court must simply review the record to ascertain if Commerce's determination is supported by substantial evidence. *See Matsushita Elec. Indus. v. United States*, 3 Fed. Cir. (T) 44, 54, 750 F.2d 927, 936 (1984) (noting that it is not the function of the court to reweigh evidence).

Commerce dedicated a significant portion of the *Final Results* to analysis of the pricing and cost data and its effect on the "not likely" determination. Commerce summarized its analysis in the following passage:

> (1) The respondents' own sales and cost data indicate that there were a substantial number of home market sales made at prices below COP during the two months immediately following the close of the third administrative review; (2) the lowest point of the downturn, in terms of DRAM pricing and other market conditions, did not occur until after mid-1996 (well after the end of the third administrative review period); (3) publicly available spot market pricing data, when viewed in conjunction with the respondent's [sic] cost data, extrapolated to a future point in time, indicate that LGS and Hyundai may have made U.S. sales at prices below COP during 1996; (4) respondent's [sic] own pricing data indicate that contract prices generally follow the same pricing patterns as spot market prices; and (5) many of the respondents' arguments concerning the alleged distortions and inaccuracies in the petitioner's analysis lack merit. In addition, we find that the respondents made several changes to their costs immediately following the third review period, including changes in depreciation and foreign exchange loss write-offs.

Final Results, at 39,817. In addition, Commerce noted that industry revenues worldwide plunged during the 1996 downturn and, in particular, respondents both reported "dramatic decreases" in their 1996 financial statements. *Id.* at 39,816.

Turning to the record, the evidence shows that while there typically is a lag, contract prices to OEMs did in fact trend in the direction of spot-market prices. *See* Mem. from Program Manager/IA to Principal Deputy Asst. Sec'y/IA (July 16, 1997), Charts C-E, C.R. Doc. No. 42 ("Final Analysis Mem.") (showing comparison of respondents' actual U.S. prices and spot prices). As Commerce found, the record also contains press reports indicating that contract prices were below spot prices in 1997. *See* Hyundai DOC Br., Ex. 9 (Computer Reseller News, *About-Face: DRAM Reverses Course—Memory Prices on the Rise*, Mar. 17, 1997, noting that "spot market prices are higher than OEM pricing by as much as $4"), and Ex. 11 (Electronic Buyer's News, *Koreans Reduce DRAM Flow*, Apr. 14, 1997, noting that spot market prices were about fifty cents higher than contract prices). The confidential record also illustrates this point, at least with respect to one respondent. And, review of the confidential record pertaining to Dr. Flamm's study shows that

report even supports some of Commerce's price-to-cost conclusions for the 1997 period.

Similarly, the record affirms that Commerce had reason to express skepticism about LG Semicon's submitted cost data. Specifically, LG Semicon did not report its change in the depreciation schedule and its corresponding effect on cost until after the verification and after Commerce issued its preliminary results. Because LG Semicon decided not to disclose this significant change until late in the proceedings, Commerce had reason to question the effect of the change on LG Semicon's cost data. It was therefore reasonable for Commerce to accord little weight to LG Semicon's unverified cost data and the corresponding cost projections and for it to rely instead on Micron's submitted projections. Finally, LG Semicon is correct that Commerce found *de minimis* margins for LG Semicon for the January to April, 1996 period, even though DRAM prices were declining rapidly during this period. Yet, the record also shows that DRAM prices continued to decline between May and December, 1996, and in some cases by as much as sixty percent.

Thus, while the Court again notes that in its view, Commerce could have decided that the voluminous record showed respondents were not likely to dump in the future, this is neither surprising nor persuasive. "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966); *see also Matsushita*, 3 Fed. Cir. (T) at 54, 750 F.2d at 936 (noting that it is "neither surprising nor persuasive" that a plaintiff can point to record evidence that detracts from Commerce's determination). Upon careful review of the record evidence here, the Court is satisfied that Commerce's assessment of the pricing and cost data and its impact on the "not likely" decision is supported by substantial evidence.

iii. *Commerce's Characterization of the DRAM Market's Health is Supported by Substantial Evidence.*

Hyundai argues that Commerce's decision is unsupported by substantial evidence because it focused on the condition of the DRAM market in 1996, rather than 1997. Hyundai maintains that evidence on the record illustrated that the DRAM market had stabilized in 1997 and, hence, the record demonstrates that respondents were not likely to dump in the future. In particular, Hyundai points to record evidence indicating that spot prices for two high volume DRAM models increased between October, 1996 and April, 1997. *See* Hyundai DOC Br., Ex. 4. Hyundai also references two reports from industry analysts in 1997—one stating "[w]e believe that the momentum of the current drive to raise prices will carry on at least through May, [1997]" *id.* at Ex. 5 (De Dios & Associates, The DRAM Market Advisor, Feb. 5, 1997, at 11), and the other noting that "[t]he long awaited DRAM cycle has turned up * * * Memory bit growth is believed to be strong, faster than supply at the margin and less excess capacity exists than many have estimated." *Id.* at

Ex. 15 (Merrill Lynch, Semiconductors Update, Mar. 5, 1997). Finally, Hyundai notes the record establishes that Micron itself even acknowledged the improved market conditions in 1997.

It is true that in the *Final Results*, Commerce devoted significant attention to the declining state of the DRAM industry in 1996. *See Final Results*, at 39,816–17 (noting repeatedly the various indicators illustrating a market downturn in 1996). In addition, however, Commerce considered the health of the industry in 1997. Indeed, consistent with Hyundai's claim, Commerce remarked that "market conditions in the DRAM industry have recovered somewhat in 1997." *Id.* at 39,814. Yet, Commerce later was careful to temper this statement and make clear that, in its view, the stability of the market was still uncertain in 1997. More specifically, Commerce found that

> Wholly apart from the data concerning the 1996 downturn, * * * our analysis indicates that market conditions in the DRAM industry remain volatile. As stated previously, while the plunge in prices began to stabilize somewhat in early 1997, recent data indicate that prices are headed downward again. For example, according to publicly available data, the average U.S. price for a 16M DRAM fell from approximately $18.00 in May 1996 to approximately $7.00 in December 1996. According to Dataquest, the price for the 16M as of June 30, 1997, is approximately $6.50. This represents a 64 percent decline in prices between the end of the third period of review (April 30, 1996) and June 1997.

Final Results, at 39,818. The record supports Commerce's analysis. For instance, just prior to Commerce's decision, spot prices for one DRAM model dropped nearly fifteen percent in two weeks. *See* Letter from Micron to DOC (July 3, 1997), Attach., P.R. Doc. No. 153 (Dataquest, The Semiconductor DQ Monday Report, June 23, 1997, and June 30, 1997). Also, the record indicates that some industry analysts expressed skepticism about the market's rebound. In particular, one of the reports cited by Hyundai commented that "[t]he momentum and market psychology can still shift back in the opposite direction," Hyundai DOC Br., Ex. 5 (De Dios & Associates, The DRAM Market Advisor, Feb. 5, 1997, at 2), while another report indicated that "[t]he mainstay 16-Mbit market last week continued to be highly unstable. Analysts and independent distributors all agreed that average selling prices slipped about 10% in the spot market." Letter from Micron to Commerce (May 2, 1997), Ex. 1, P.R. Doc. No. 133 (Electronic Buyer's News, *DRAM Price Skid Reaches 64-M Parts*, Apr. 28, 1997). In sum, the Court is satisfied that Commerce reached its "not likely" determination after considering the state of the DRAM industry in both 1996 and 1997. And, the Court is satisfied that substantial evidence supports Commerce's analysis in this respect.

iv. *Commerce's Assessment of Supply and Demand Trends in 1997 is Supported by Substantial Evidence.*

During the underlying administrative proceeding, respondents publicly announced that they planned to reduce production on lower priced

DRAMs. Hyundai contends the production cutbacks were intended to bring supply and demand into balance, thereby stimulating recovery in the DRAM market. As support, Hyundai points to an article on the record, reporting that Korean producers actually were reducing production in early 1997. "The longer the flow of South Korean DRAMs into the spot market remains low, the more credible are claims of the Big Three chip makers in that country that they aren't building up excessive stocks that must be dumped later." Hyundai's DOC Br., Ex. 11 (Electronic Buyer's News, *Koreans Reduce DRAM Flow*, Apr. 14, 1997). Hyundai also identifies record evidence forecasting continued growth in personal computers for 1997 and claims corresponding demand for DRAMs was likely to result. Hyundai maintains Commerce gave insufficient weight to this record evidence, which, according to Hyundai, tends to show that respondents would not be likely to dump in the future.

In the *Final Results*, Commerce acknowledged that respondents announced cutbacks in DRAM production yet concluded "it is unclear how much of an effect this will have on the overall supply of DRAMs." *Final Results*, at 39,817. Commerce's conclusion is supported by substantial evidence. First, some reports on the record indicated that the announced production cuts were actually production shifts from the 16M DRAM to the 64M DRAM, *see* Hyundai DOC Br., Ex. 7 (Electronic News, *Korean Big 3 in Partial Shift to 64M*, Feb. 3, 1997), and that "excess supply" of 64M DRAMs was expected to persist throughout 1997. *See* Letter from Micron to DOC (May 2, 1997), Ex. 1, P.R. Doc. No. 133 (Electronic Buyer's News, *DRAM Price Skid Reaches 64-M Parts*, Apr. 28, 1997). In addition, one industry report issued in April, 1997 concluded that "Korean DRAM makers have not reduced their production of DRAMs in the last 6 weeks. However they have started holding product off the market and are constraining supply to prop [up] prices, while building inventories in die banks that will be unleashed on the market later." Letter from Micron to DOC Transmitting Resp. Br. (Apr. 30, 1997), Ex. 1, P.R. Doc. No. 132 (Goldman, Sachs & Co. Investment Report, Apr. 14, 1997). Upon review of the record evidence, the Court finds that Commerce's analysis of the effect of respondents' announced production cuts on overall supply and demand is based on substantial evidence.

v. *Commerce's Decision is Based on Substantial Evidence, Notwithstanding Hyundai's Construction of a DRAM Facility in the United States.*

Hyundai next argues that it has no economic incentive to dump in the future. More concretely, Hyundai informed Commerce that the company was "in the final stages of building" a $1.4 billion DRAM wafer fabrication facility in Eugene, Oregon. *See* Hyundai DOC Br., at 26–27. Hyundai noted that when operational, the Eugene facility will be one of the largest DRAM plants in the United States and will be capable of producing the most advanced DRAM models. *Id.* Commerce made no mention of this evidence in its *Final Results*; because Hyundai maintains this evidence plainly indicates it has no incentive to dump in the future,

it argues Commerce's "not likely" decision is not based on substantial evidence.

The Court does not agree. Hyundai is correct in that Commerce's *Final Results* did not probe the effect of Hyundai's new facility on future dumping. And, the Court is puzzled by government counsel's following defense at oral argument: "What [the building of the plant] tells you at a minimum is that [Hyundai] may not need to ship to the United States. It doesn't tell you a [] thing about dumping, price discrimination." Tr. of Oral Arg., at 57. It is unclear to the Court how future dumping is possible if there are no shipments to the United States. Notwithstanding the infirmity in counsel's presentation at oral argument, Commerce correctly points out that there is no evidence on the record to indicate that Hyundai will stop, or even decrease, shipments to the United States after the facility comes on line. While one surely might reach this conclusion by virtue of the plant's existence, one also might not. And, no record evidence exists to resolve the question. So viewed, it was reasonable for Commerce to ignore the existence of the Eugene facility, and its decision to do so does not detract from the whole of the record evidence that supports the "not likely" determination.

vi. *Commerce's Finding that LG Semicon In Fact Had Economic Incentive To Dump, Notwithstanding Its Small Market Share, is Supported by Substantial Evidence.*

LG Semicon contends that Commerce's "not likely" decision is unsupported by substantial evidence because the company is not a major participant in the U.S. market and, thus, has no economic incentive to dump. In particular, LG Semicon highlights record evidence, illustrating that the U.S. market made up only a small percentage of its total global DRAM sales in 1995 and 1996. And, LG Semicon notes that it ranked 12th among 17 U.S. DRAM suppliers in 1996 by volume, holding only two to three percent of the market throughout the period of review. On this evidence, LG Semicon asserts it had no rational business incentive to dump in the future.

In the *Final Results*, Commerce responded to LG Semicon's argument as follows:

> the United States is part of the world's largest regional market for DRAMs, with considerable growth potential. Given the importance of the U.S. market, as a general matter, even a producer with a relatively small market share would have an incentive to ride out industry downturns. The fact that DRAM producers, including Korean respondents, have historically been found to have dumped during downturns supports this conclusion.

Final Results, at 39,819. Record evidence shows that the United States is the world's largest market for DRAMs. *See* Final Analysis Mem., Point 4. Moreover, record evidence shows that in absolute terms, the value of LG Semicon's DRAM sales in the U.S. market was significant through the POR. *Id.* Based on this evidence alone, it was entirely rea-

sonable for Commerce to conclude that the U.S. market would remain significant for LG Semicon despite its small market share.

vii. *Commerce Considered Exchange Rate Data and Its Conclusions are Based on Substantial Evidence.*

LG Semicon next argues that Commerce failed to consider significant exchange rate data. The record demonstrates that the Korean won appreciated against the U.S. dollar over the course of the POR, thereby raising the cost of producing DRAMs in Korea. LG Semicon concedes this point yet notes that the record also shows the won depreciated against the dollar after the POR, thereby decreasing Korean production costs and the potential incidence of sales below cost. LG Semicon also offered data, showing that Korean producers purchased much of their equipment from Japan, which it considers significant because the yen depreciated against the won after the POR. Thus, LG Semicon asserts that its purchases of Japanese equipment after the POR were less expensive, thereby further reducing production costs. LG Semicon maintains that Commerce failed to consider these currency movements and their effect on Korean DRAM prices and costs.

Commerce considered the exchange rate data. First, Commerce acknowledged this claim in the *Final Results*, noting that LG argued "the won is currently depreciating against the dollar, negating the possibility of exchange rate dumping." *Final Results*, at 39,816. Commerce then responded to this argument when it stated,

> we note that Korean DRAM producers import machinery and equipment and many raw materials. In fact, both respondents recorded large foreign exchange losses for fiscal year 1996. Therefore, the depreciation of the won may have actually tended to increase the respondent's COP, making dumping more likely in the United States. At the very least, we find no basis in the record to conclude that this exchange rate depreciation entirely favored the respondents.

Id., at 39,818. It is true that at first blush the depreciating won should lead one to conclude that production costs would decrease, thus making sales below cost less likely. Yet, upon careful review of the record, the Court is satisfied that Commerce's conclusion was reasonably drawn. Two factors particular to this case support this finding. Specifically, the effect of the won's depreciation on (1) servicing foreign-currency denominated loans, and (2) depreciation costs for machinery and equipment, an important cost factor, made it conceivable that LG Semicon's costs might have increased as a result of the won's depreciation. Thus, Commerce considered LG Semicon's argument and its conclusion is reasonable based on the record evidence.

viii. *Commerce Correctly Decided that the Proposed Data Collection Program Was Not Relevant to the "Not Likely" Determination.*

Finally, both plaintiffs argue that Commerce ignored a crucial piece of evidence that had direct bearing on whether respondents were "not likely" to dump in the future—a proposed data collection program be-

tween a U.S. importer of Korean DRAMs, Compaq Computer Corporation, and the government of Korea that had been accepted by both LG Semicon and Hyundai. The parties intended the proposal as additional assurance that Korean producers would not dump in the future. Plaintiffs maintain Commerce disregarded the import of this program and, hence, its decision is not based on substantial evidence.

This argument is without merit. For purposes of the "not likely" assessment, the Court fails to see how the proposal at issue is to be distinguished from the requisite agreements that respondents must enter pursuant to 19 C.F.R. § 353.25(a)(2)(iii). That is, both forms of agreement appear to provide that respondents' activity in the DRAMs market will be monitored to assure that dumping does not recur. It is unclear then why the proposal at issue has some purported relevance for the "not likely" determination, though, as the framing of the regulation makes clear, the requisite agreements do not. Thus, Commerce was correct when it stated that "while we have considered this proposed data program, we find that this program has no bearing on the likelihood issue." *Final Results*, at 39,811.

* * * * * * *

In sum, plaintiffs have identified record evidence that detracts from Commerce's "not likely" determination. Indeed, after combing the record, the Court finds that the agency very easily might have reached the opposite conclusion. Yet, this is unsurprising given the extensive record in this case. Commerce was charged with the very difficult task of predicting future behavior. And, while certain record evidence detracts from its decision, the Court is also satisfied that, on the whole, substantial evidence supports its decision.

IV.

CONCLUSION

For the foregoing reasons, the Court sustains Commerce's decision not to revoke the antidumping order on DRAMs from Korea. A separate Order will be entered accordingly.

(Slip Op. 99–45)

METER S.P.A., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 95–04–00371

(Dated May 21, 1999)

JUDGMENT

TSOUCALAS, *Senior Judge:* On May 11, 1995, the Court ordered the Department of Commerce, International Trade Administration ("Commerce") to correct certain ministerial errors in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Italy; Final Results of Antidumping Administrative Reviews and Revocation in Part of an Antidumping Duty Order*, 60 Fed. Reg. 10,959 (Feb. 28, 1995). The Court further ordered that Commerce publish amended final results incorporating these corrections in the Federal Register and that the parties file amended complaints to take into account any changes in the final results resulting from Commerce's action. *See Meter v. United States*, 19 CIT 692, Slip Op. 95–90 (May 11, 1995) (order granting plaintiff's consent motion for leave of Court to correct ministerial errors)(Tsoucalas, Judge).

Upon due deliberation, this Court, having found that Commerce published amended final results incorporating the corrections as ordered, *see Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Italy; Amended Final Results of Antidumping Duty Administrative Review*, 60 Fed. Reg. 33,791 (June 29, 1995), and the parties, having failed to file amended complaints within thirty days of the publication of the amended results, and all other issues having been decided, it is hereby

ORDERED that this case is dismissed.

(Slip Op. 99–46)

MITSUBISHI HEAVY INDUSTRIES, LTD. AND TOKYO KIKAI SEISAKUSHO, LTD., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND GOSS GRAPHICS, INC., DEFENDANT-INTERVENOR

Consolidated Court No. 96–10–02292

[Final results of Commerce's redetermination sustained in part and remanded in part.]

(Decided May 26, 1999)

Steptoe & Johnson LLP (Anthony J. LaRocca, Richard O. Cunningham, Eric C. Emerson, Gregory S. McClure) for Plaintiff Mitsubishi Heavy Industries, Ltd.; *Perkins Coie LLP (Yoshihiro Saito, Mark T. Wasden)*, for Plaintiff Tokyo Kikai Seisakusho, Ltd.

David W. Ogden, Acting Assistant Attorney General, Civil Division, U.S. Department of Justice; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Randi Rimerman Serota*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Robert J. Heilferty*, Senior Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for Defendants.

Wiley, Rein & Fielding (Charles Owen Verrill, Jr., Alan H. Price, John R. Shane, Leslie Johnson Pujo) for Defendant-Intervenor.

OPINION

POGUE, *Judge:* On June 23, 1998, this Court remanded certain aspects of the U.S. Department of Commerce's ("Commerce") determination in *Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Japan*, 61 Fed. Reg. 38,139 (Dep't Commerce, July 23, 1996)(final determ.)*("Japan Final")*, as amended by *Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Japan*, 61 Fed. Reg. 46,621 (Dep't Commerce, Sept. 4, 1996)(antidumping duty order and amend. to final determ.). *See Mitsubishi Heavy Industries, Ltd. v. United States*, 22 CIT ____, 15 F. Supp.2d 807 (1998)*("Mitsubishi")*.[1]

Specifically, the Court directed Commerce: 1) to correct its error in allocating Plaintiffs' indirect selling costs incurred in Japan; 2) to explain its decision to adjust normal value for imputed credit expenses; 3) to re-evaluate its decision to treat certain suppliers of MHI's as affiliated parties; 4) to reconsider its decision not to treat a trading company and MHI as affiliated parties; and 5) to reconsider its decision to treat LNPPs sold in the home market as foreign like product. *See id.* at ____, 15 F. Supp.2d at 834.

The Commission issued its final remand determination ("Remand Determ.") on December 21, 1998.

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[1] In that proceeding, Plaintiffs Mitsubishi Heavy Industries, Ltd. ("MHI") and Tokyo Kikai Seisakusho, Ltd. ("TKS"), respondents in the underlying investigation, and Plaintiff Goss Graphic Systems, Inc. ("Goss"), petitioner in the underlying investigation, filed separate motions challenging various aspects of Commerce's determination. The motions were consolidated.

Moreover, the antidumping investigation of large newspaper printing presses ("LNPPs") from Japan was conducted simultaneously with Commerce's investigation of sales of LNPPs from Germany. Issues common to both investigations were discussed in *Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Germany*, 61 Fed. Reg. 38,166 (Dep't Commerce, July 23, 1996)(final determ.)*("Germany Final")*.

STANDARD OF REVIEW

The Court will uphold a Commerce determination in an antidumping investigation unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" Section 516A(b)(1)(B)(i) of the Tariff Act of 1930, *as amended*, 19 U.S.C. § 1516a(b)(1)(B)(i)(1994).

DISCUSSION

I. *Plaintiffs' Indirect Selling Expenses Incurred in Japan*

In the underlying proceeding, Commerce determined the U.S. price based on constructed export price ("CEP").[2] The CEP provision requires Commerce to reduce the price at which the subject merchandise is first sold to an unaffiliated customer in the United States by the amount of selling expenses "incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise * * *." 19 U.S.C. § 1677a(d)(1)(1994). Indirect selling expenses are a component of selling expenses.[3] *See* 19 U.S.C. § 1677a(d)(1)(D)(requiring Commerce to deduct from CEP any selling expenses not deducted as commissions, direct selling expenses, or selling expenses that the seller pays on behalf of the purchaser). The statute limits CEP deductions to "expenses * * * associated with economic activities occurring in the United States." Statement of Administrative Action, H.R. Doc. No. 103–316, 103rd Cong., 2nd Sess. (1994), reprinted in URUGUAY ROUND AGREEMENTS ACT, LEGISLATIVE HISTORY, Vol. VI, at 823 ("SAA").[4] This Court has held that "[e]xpenses incurred outside of the United States could still be 'associated with' economic activities occurring in the United States." *Mitsubishi*, 22 CIT at ____, 15 F. Supp.2d at 818. Therefore, in the present matter, Commerce properly decided to deduct indirect selling expenses incurred by the Plaintiffs in their home market of Japan associated with their exports of LNPPs to the United States. *See id.*

Based on the information reported by the Plaintiffs at verification, however, Commerce was "unable * * * to quantify the portion of the [Plaintiffs'] total indirect selling expenses [incurred in Japan that] were associated with the U.S. sales." *Germany Final* at 38,174. Therefore,

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[2] Commerce calculates an antidumping duty by comparing an imported product's price in the United States to its normal value ("NV")(i.e., the price of comparable merchandise in the exporting country). The dumping margin is the amount by which the normal value exceeds the U.S. price. *See* 19 U.S.C. § 1673(1994).

The United States price is calculated as either the "export price" ("EP") or the "constructed export price" ("CEP"). *See* 19 U.S.C. § 1677a. Typically, Commerce uses EP when the foreign exporter sells directly to an unrelated U.S. purchaser. *See* 19 U.S.C. § 1677a(a). Commerce uses CEP when the foreign exporter sells through a related party in the United States. *See* 19 U.S.C. § 1677a(b).

NV is the price of the merchandise in the producer's home market or its export price to countries other than the United States. *See* 19 U.S.C. § 1677b(a)(1). Where Commerce cannot compute the home-market price, Commerce may base NV on a constructed value ("CV"), *see* 19 U.S.C. § 1677b(a)(4), which is calculated pursuant to § 1677b(e).

[3] "Indirect selling expenses are selling expenses that the seller would incur regardless of whether particular sales were made but that reasonably may be attributed, in whole or in part, to such sales (e.g., salesperson's salaries)." Antidumping Manual, Ch. 8 at 44.

[4] The Statement of Administrative Action represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements * * *." SAA at 656. "[I]t is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement." *Id.* (quoted in *Delverde, SrL v. United States*, 21 CIT ____, ____, 989 F. Supp. 218, 229–30, n.18 (1997)).

Commerce derived a methodology to accomplish the deduction as non-adverse facts available. *See id.* Commerce multiplied the total indirect expenses incurred in Japan by the ratio of all other CEP deductions made under 19 U.S.C. § 1677a(d)(1) to the contract price net of the total indirect selling expenses incurred in Japan. *See id.*

Commerce subsequently concluded, however, that in applying this methodology, Commerce inadvertently overstated the amount of indirect selling expenses to be deducted from CEP. Specifically, Commerce explained that the pool of indirect selling expenses incurred in the home market and allocated to MHI's U.S. sales included "various office and planning expenses * * * [that were] not the type of expenses that ordinarily would be associated with United States economic activity." Response Court's Apr. 21, 1998 Ord. Regarding Treatment Indirect Selling Expenses at 2. Because Commerce's determination was based on a factual error, this Court remanded the matter to Commerce to evaluate whether its allocation methodology either understated or overstated MHI's indirect selling expenses and to correct the error. *See Mitsubishi*, 22 CIT at ___, 15 F. Supp.2d at 819.

On remand, Commerce "concluded that the ratio should [have been] applied to a smaller pool of indirect selling expenses incurred in Japan than [had been] used in the Final Determination." Remand Determ. at 3. Specifically, Commerce removed the following types of expenses incurred in Japan from the indirect selling expense pool: salaries and related expenses, office expenses, planning expenses, consumable stationary expenses, book and printing expenses, insurance, employee education, and department, section, and other charges. *See id.* Commerce concluded, "In the absence of record evidence to the contrary, it would be unduly punitive to presume that such expenses were incurred on the sale to the unaffiliated customer in the United States." *Id.*

The SAA states that "[CEP] is now calculated to be, as closely as possible, a price corresponding to an export price between non-affiliated exporters and importers." SAA at 823. MHI now argues that Commerce's methodology is "arbitrary" because it does not ensure that "indirect selling expenses consistent with an EP transaction [will] not be deducted." Cmts. of Pl. MHI on Remand Determ. at 3–4. MHI maintains that, while Commerce's methodology may properly allocate a portion of the indirect selling expenses incurred in Japan to the economic activities occurring in the United States, "the objective of the allocation is to identify only those expenses that are inconsistent with an EP transaction." *Id.* at 4. Because Commerce did not explain how its methodology fulfilled this objective, MHI argues, its methodology should be rejected. *See id.*

Regarding this matter, however, the Court has already held that "[19 U.S.C. § 1677a(d)(1)] does not require * * * Commerce [to] examine every potential CEP deduction to determine whether the activity generating the expense would be inconsistent with an EP transaction." *Mitsubishi*, 22 CIT at ___, 15 F. Supp.2d at 818. Under the statute, Commerce has the authority to deduct indirect selling expenses that are

associated with the sales of exports in the United States from CEP, whether incurred in the United States or the home market. *See id.*

Here, as noted, Commerce was able to confirm that certain of the home-market indirect selling expenses were associated with U.S. activity, but was unable to quantify the exact portion of such expenses attributable to U.S. sales based on the information reported. *See Germany Final* at 38,174. Therefore, as non-adverse facts available, Commerce multiplied the total indirect selling expenses incurred in Japan by the ratio of all other CEP deductions made under 19 U.S.C. § 1677a(d)(1) to the contract price net of the total indirect selling expenses incurred in Japan. *See id.* Because it was reasonable, under the circumstances here, for Commerce to assume that the percentage of the home-market indirect selling expenses associated with U.S. economic activity would correspond with the remaining 19 U.S.C. § 1677a(d)(1) CEP deductions' percent share of the contract price, Commerce's methodology was in accordance with law.

In addition, both MHI and Goss argue that Commerce's calculation of home-market indirect selling expenses was unreasoned because the agency failed to articulate a standard for determining which expenses should have been included in the pool of home-market indirect selling expenses to which the ratio was applied. *See* Cmts. of Pl. MHI on Remand Determ. at 4; Rebuttal of Goss to Cmts. of MHI at 4.

The Court disagrees. Commerce reasonably interpreted the statute as requiring it to deduct from CEP indirect selling expenses that were associated with economic activities occurring in the United States. *See Mitsubishi*, 22 CIT at ____, 15 F. Supp.2d at 818; *see also* SAA at 823 ("[CEP] will be calculated by reducing the price of the first sale to an unaffiliated customer in the United States by the amount of the [statutory] expenses * * * *associated with economic activities occurring in the United States*[.]")(emphasis added).

Therefore, the standard Commerce applied was self-evident: Commerce excluded from the pool of indirect selling expenses incurred in Japan those expenses that were not generally associated with the sales of LNPP exports in the United States (i.e., salaries, office expenses, planning expenses, consumable stationary expenses, book and printing expenses, insurance, employee education, etc.). *See* Remand Determ. at 3.

In this regard, Commerce had to "'reason its way to a decision without pretending that that decision reflected some degree of rational perfection * * *.'" *Mitsubishi*, 22 CIT at ____, 15 F. Supp.2d at 831 (quoting *Fishermen's Dock Co-op., Inc. v. Brown*, 75 F.3d 164, 173 (4th Cir. 1996)). "'Where the agency's line-drawing does not appear irrational and the [plaintiff] has not shown that the consequences of the line-drawing are in any respect dire * * * [the court] will leave that line-drawing to the agency's discretion.'" *Id.* (quoting *Leather Indus. of America, Inc. v. E.P.A.*, 40 F.3d 392, 409 (D.C. Cir. 1994)). In its remand determination, Commerce stated, "In the absence of record evidence to the contrary, it would be unduly punitive to presume that [certain expenses]" were as-

sociated with economic activities occurring in the United States. Remand Determ. at 3. Therefore, based on the evidence before it, Commerce's decision on remand to exclude certain expenses from the pool of home-market indirect selling expenses was a permissible exercise of its discretion to draw the lines in this case.

Because Commerce's methodology was in accordance with law, the Court sustains Commerce's remand calculation of MHI's indirect selling expenses incurred in Japan.[5]

II. *Home-Market Imputed Credit Expenses*

The imputed credit expense represents the producer's opportunity cost of extending credit to its customers. By allowing the purchaser to make payment after the shipment date, the producer forgoes the opportunity to earn interest on an immediate payment. Thus, the imputed credit expense reflects the loss attributable to the time value of money. Commerce's usual imputed credit calculation is based only on the cost of financing receivables between shipment date and payment date. *See Mitsubishi*, 22 CIT at ____, 15 F. Supp.2d at 820. In its final determination, Commerce deducted the credit expenses imputed to U.S. sales from CEP and deducted the credit expenses imputed to home-market sales from CV. *See Japan Final* at 38,147. Commerce made the deduction from CV as a circumstance of sale adjustment. *See* Remand Determ. at 5; *see also* 19 U.S.C. § 1677b(a)(6)(C)(iii)(1994).[6]

The statute requires Commerce to include in CV the actual amounts of selling, general, and administrative ("SG&A") expenses incurred by the producer in the home market. *See* 19 U.S.C. § 1677b(e)(2)(A)(1994). Imputed credit expenses are not actual expenses, but rather opportunity costs. Therefore, prior to making the circumstance of sale adjustment, Commerce did not include imputed credit expenses in the CV calculation for the final determination. *See Japan Final* at 38,148.

Because Commerce did not add imputed credit expenses to CV in the first place, Goss argued that Commerce should not have deducted an amount for home-market imputed credit expense from CV as a circumstance of sale. *See Mitsubishi*, 22 CIT at ____, 15 F. Supp.2d at 823. In rebuttal, Commerce explained that the current statute also requires actual profit to be added to CV. *See id.* at ____, 15 F. Supp.2d at 824; *see also*

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[5] In our original decision, this Court also directed Commerce to respond to TKS's argument that Commerce overstated its indirect selling expenses in the same way it overstated MHI's. *See Mitsubishi*, 22 CIT at ___, 15 F. Supp.2d at 819. Accordingly, Commerce reviewed the matter and determined that CEP should not be reduced by the amount of TKS's indirect selling expenses incurred in Japan because Commerce found no record evidence of indirect expenses based on U.S. economic activity for TKS. *See* Remand Determ. at 4 (citing TKS Home Market Verification Report (Conf. Doc. 191)(May 14, 1996) at 16). Moreover, TKS agrees with Commerce's determination on remand not to reduce CEP by the amount of indirect selling expenses incurred in Japan. *See* Cmts. of TKS on Remand Determ. at 14. Because, based on the record, Commerce reasonably concluded that TKS incurred no home-market indirect selling expenses associated with U.S. economic activity, the Court sustains Commerce's decision on remand not to reduce CEP by the amount of such expenses.

[6] According to the statute, a NV that is based on CV is subject to the same adjustments as NV based on home-market or third-country sales. 19 U.S.C. § 1677b(a)(8). Commerce describes the imputed credit adjustment as a circumstance of sale adjustment. *See Germany Final* at 38,187. The circumstance of sale adjustment for imputed credit expenses adjusts for differences in the payment terms extended to customers in the U.S. and home markets. *See Engineered Process Gas Turbo-Compressor Systems From Japan*, 62 Fed. Reg. 24,394, 24,407 (Dep't Commerce, May 5, 1997)(final determ.). This Court has held that Commerce's decision to treat the imputed credit expense as a circumstance of sale was reasonable. *See Mitsubishi*, 22 CIT at ___, 15 F. Supp.2d at 821.

19 U.S.C. § 1677b(e)(2)(A). When actual profit is used, Commerce argued, imputed credit is reflected in the profit amount included in CV. *See Mitsubishi*, 22 CIT at ____; 15 F. Supp.2d at 824. The Court, however, could not sustain Commerce's argument because it was a post hoc rationalization advanced by agency counsel. *See id.* (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983)). Therefore, the Court remanded the matter for Commerce to explain its decision on the record. *See id.*

On remand, Commerce explained that, "[b]y using the respondent's actual sales revenue and costs to compute CV profit, the CV reflect[ed] a NV unadjusted for imputed credit." *See* Remand Determ. at 6–7. Therefore, Commerce contended, using an actual amount of profit did not preclude the imputed interest expense adjustment even though NV was based on CV. *See id.* at 7 (citing SAA at 831 ("New section [19 U.S.C. § 1677b(a)(8)] ensures continuation of the ability to make appropriate adjustments to constructed value when [constructed value] serves as the basis for normal value.")).

Moreover, Commerce stated that this methodology was consistent with its current practice. *See id.* (citing *Engineered Process Gas Turbo-Compressor Systems From Japan*, 62 Fed. Reg. 24,394, 24,408 (Dep't Commerce, May 5, 1997)(final determ.)(explaining that, while Commerce "would not add an amount for imputed credit expenses in the calculation of CV pursuant to [19 U.S.C. § 1677b(e)(2)(A)], such expenses are reflected in the calculation of CV profit and interest expense"); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France*, 62 Fed. Reg. 2,081, 2,119–20 (Dep't Commerce, Jan. 15, 1997)(final results of admin. review)).

Therefore, the issue before the Court is whether it was permissible for Commerce to assume that the actual home-market profit component of CV reflected the opportunity cost of extending credit to customers. Neither the statute nor its legislative history discusses whether imputed credit expenses are consistent with the CV profit calculation. Therefore, the Court will defer to Commerce's interpretation so long as it was reasonable. *See Koyo Seiko Co., Ltd. v. United States*, 36 F.3d 1565, 1573 (Fed. Cir. 1994)(stating that, where the statute and its legislative history do not clearly indicate Congress's intent, the court will defer to Commerce's reasonable interpretation).

The Court finds that Commerce's decision to deduct imputed credit expenses from CV was reasonable, especially in light of the statute's objective of achieving a fair comparison. *See* 19 U.S.C. § 1677b(a).

In the face of no counter arguments from Goss, it seems reasonable for Commerce to assume that the Plaintiffs would have sought to recover the opportunity cost of extending credit to their local customers in the home-market price. A forgone activity should be counted as a cost where the firm would have actually engaged in that activity. *See* STEVEN E. LANDSUBRG, PRICE THEORY AND APPLICATIONS 38 (1995). Accordingly, it seems reasonable to assume that the Plaintiffs would have elected to

earn interest had they demanded immediate payments, thereby maximizing revenue. Under this line of reasoning, the producers increase their home-market prices to recover for the opportunity cost of extending credit to their customers. Total revenue is equal to the home-market price multiplied by the total number of home-market sales. The actual profit component of CV is equal to total revenue minus total actual costs. Therefore, a component of the Plaintiffs' actual profit on home-market sales reflects the imputed credit expense.

Indeed, Commerce made the same assumption for U.S. sales in deducting imputed credit expenses from CEP, the U.S. sales price. *See* Remand Determ. at 5, 7. Thus, Commerce's decision to adjust both CV and CEP for imputed credit expenses was reasonable in order to ensure a fair comparison. *See* 19 U.S.C. § 1677b(a)("a fair comparison shall be made between the export price or constructed export price and normal value"); *see also Koyo Seiko*, 36 F.3d at 1568 ("To ensure that the quantum of antidumping duties is calculated in a fair manner, both foreign market value and United States price are subject to certain adjustments in order to achieve a common point at which to perform the price comparison.").

Because Commerce's treatment of imputed credit expenses as reflected in CV profit was permissible, the Court sustains Commerce's decision to deduct imputed credit expenses from CV.

III. *The Affiliation of Certain Major Input Suppliers*

The statute directs Commerce to examine transactions between "affiliated" companies involving the production by one of such companies of a "major input" to the merchandise produced by the other. *See* 19 U.S.C. § 1677b(f)(3)(1994). Thus, for the purpose of this provision, Commerce must determine whether the producer and supplier are "affiliated." Under the statute, the following persons, among others, are to be considered affiliated persons: "[a]ny person who *controls* any other person and such other person." 19 U.S.C. § 1677(33)(G)(1994)(emphasis added). Moreover, "a person shall be considered to *control* another person if the person is legally or operationally in a position to exercise restraint or direction over the other person." *Id.* (emphasis added). The SAA explains that "[a] company may be in a position to exercise restraint or direction * * * through * * * close supplier relationships in which the supplier or buyer becomes reliant upon the other." SAA at 838.

Here, the Court found that Commerce failed to state the basis upon which it determined that certain suppliers of major inputs were affiliated with MHI pursuant to 19 U.S.C. § 1677(33)(G). *See Mitsubishi*, 22 CIT at ____, 15 F. Supp.2d at 832. During its investigation, Commerce had requested that MHI list inputs obtained from suppliers that furnished more than fifty percent of their total annual sales to MHI, yet Commerce stated in its final determination that it "never indicated that this constitute[d] affiliation." *Japan Final* at 38,163. Therefore, the

Court remanded this issue for Commerce to reevaluate its determination. *See Mitsubishi*, 22 CIT at ___, 15 F. Supp.2d at 832.

On remand, Commerce explained that, "[b]ecause LNPP was one of the first proceedings under the [Uruguay Round Agreements Act,] [Commerce] could only look to the SAA and the Proposed Rules for guidance."[7] Remand Determ. at 10. As noted, the SAA indicates that "close supplier relationships" may constitute sufficient control to satisfy 19 U.S.C. § 1677(33)(G), but does not define the term. *See* SAA at 838. Moreover, the *Proposed Rules* indicate Commerce's intention to develop the URAA definition of "control" on a case-by-case basis. *See Proposed Rules* at 7,310.

With this background, Commerce explained its methodology for determining whether MHI's suppliers of major inputs were affiliated with MHI within the meaning of 19 U.S.C. § 1677(33)(G):

> In this case, [Commerce] determined that a reasonable reporting parameter for this purpose would be to consider any supplier that depended upon MHI for 50 percent or more of its sales during each year during a five year period to be potentially subject to the restraint or direction of MHI.

Remand Determ. at 10.

Commerce is to be accorded substantial deference in interpreting the antidumping laws. *See Torrington Co. v. United States*, 68 F.3d 1347, 1351 (Fed. Cir. 1995)(citing *Daewoo Elecs. Co. v. Int'l Union*, 6 F.3d 1511, 1516 (Fed. Cir. 1993), *cert. denied*, 512 U.S. 1204 (1994)). Therefore, where as here, Congress leaves a term undefined, it is within Commerce's discretion to develop the meaning of the term on a case-by-case basis so long as its application in a given case is reasonable.

The Court finds that the greater-than-fifty-percent-sales-dependence-for-five-years test was a reasonable reporting parameter in this case. As noted, the SAA states that close supplier relationships may be indicia of "control" under 19 U.S.C. § 1677(33)(G). *See* SAA at 838. Given the existence of a large number of major input suppliers in this case, *see* Remand Determ. at 10, it was reasonable for Commerce to conclude that a close supplier relationship existed where the supplier depended on MHI for fifty percent or more of its sales during each year of a five year period.

The proposed rules Commerce cited also state, however, that "[m]ere identification of the presence of one or more of these or other indicia of control does not end our task. We will examine these indicia, in light of business and economic reality, to determine whether they are, in fact, evidence of control." *Proposed Rules* at 7,310. On remand, Commerce explained that,

> [It] considered the standard of 50 percent or greater reliance for each year over a five year period appropriate in this case because:

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[7] The "Proposed Rules" refer to the regulations Commerce proposed to conform its regulations to the Uruguay Round Agreements Act ("URAA"). *See Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7,308 (Dep't Commerce, Feb. 27, 1996)(notice of proposed rulemaking)("*Proposed Rules*").

> 1) the period of investigation (and therefore the cost reporting period) for MHI was a five-year period; 2) LNPP[s] generally take multiple years to produce; and 3) this degree of reliance over an extended period of time is high for custom-made merchandise. Under the unique facts of this case, we consider this level of reliance sufficient to presume that such a supplier is affiliated with MHI on the basis of control, within the meaning of [19 U.S.C. § 1677(33)(G)] through a close supplier relationship.

Remand Determ. at 10–11.

The Court finds that substantial evidence supports Commerce's conclusion that a supplier's satisfaction of the greater-than-fifty-percent-sales-dependence-for-five-years test demonstrated affiliation on the basis of control. The record indicates that the subject LNPPs are highly customized products, requiring unique technical specifications. *See* Normal Value Mem. (Conf. Doc. 73)(Nov. 9, 1995) at 3. Coupled with the fact that LNPPs generally take multiple years to produce, it logically follows that a long term supplier would adjust its manufacturing operations to satisfy the specific demands of its purchaser. Therefore, it was reasonable for Commerce to conclude that MHI was "legally or operationally in a position to exercise restraint or direction over" suppliers dependent on MHI for fifty percent or more of their sales over a five year period.

The Court sustains Commerce's determination that certain major input suppliers of MHI were affiliated with MHI within the meaning of 19 U.S.C. § 1677(33)(G) because it was in accordance with law and supported by substantial evidence.

IV. *Commerce's Decision Not to Treat Trading Company and MHI as Affiliated Parties*

The statute defines "affiliated persons" to include "[t]wo or more persons directly or indirectly controlling, controlled by, or under common control with, any person." 19 U.S.C. § 1677(33)(F)(1994). MLP U.S.A., Inc. ("MLP") is a joint venture between MHI and a trading company ("Trading Company"). In *Mitsubishi*, Goss argued that, because MHI and Trading Company control a third person (i.e., MLP), MHI and Trading Company must be treated as affiliated persons. *See Mitsubishi*, 22 CIT at ____, 15 F. Supp.2d at 832. Commerce denied that the two parties were affiliated, however, because neither MHI nor Trading Company exercised control over each other. *See id.*

The Court held that, contrary to Commerce's interpretation, "[t]he statutory definition of affiliated parties at 19 U.S.C. § 1677(33)(F) does not require that MHI and Trading Company exercise control over each other. The statute requires only that 'two or more persons[]' control a third person." *See id.* Therefore, the Court remanded for Commerce to reevaluate its determination as to whether MHI and Trading Company were affiliated.

On remand, Commerce reconsidered its previous decision, stating, "Given the nature of MHI's and the Trading Company's ownership in a

third person, [MLP], we conclude that MHI and the Trading Company are affiliated pursuant to [19 U.S.C. § 1677(33)(F)]." Remand Determ. at 12.

MHI now argues that Commerce erroneously concluded that MHI is affiliated with Trading Company on the basis of 19 U.S.C. § 1677(33)(F). *See* Cmts. of Pl. MHI on Remand Determ. at 6. According to MHI, "The evidence establishes that MHI controls MLP, but there is no evidence in the record that Trading Company, as a minority shareholder, *also* controls MLP." *Id.* Therefore, MHI contends that Commerce's conclusion was not supported by substantial evidence.

The Court disagrees. Commerce did not find that MHI and Trading Company were affiliated under § 1677(33)(F) based solely on their common ownership of MLP. In its redetermination, Commerce stated, "The record evidence on the degree to which the Trading Company owned shares in MLP supports a conclusion that it also was 'legally or operationally in a position to exercise restraint or direction' over MLP, as set forth in section [1677(33)(F)]." Remand Determ. at 21 (citing 19 C.F.R. § 351.102(b)(stating that, in defining "affiliated parties," Commerce "will not find that control exists * * * unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product")).

Substantial evidence supports Commerce's conclusion that Trading Company is "legally or operationally in a position to exercise restraint or direction over" MLP. 19 U.S.C. § 1677(33). Trading Company owned a significant interest in MLP and made substantial loans to MLP. *See* MHI Oct. 17, 1995 Response (Conf. Doc. 15) Sec. A, Exh. 17 at 5. Moreover, the fact that MHI and Trading Company were the only shareholders of MLP and had a history of common ownership in various companies suggests that they worked together in managing MLP. *See* Ltr. from Wiley, Rein & Fielding (Conf. Doc. 126)(Feb. 2, 1996) at 8, n.17.

Therefore, the Court sustains Commerce's determination on remand that MHI and Trading Company were affiliated within the meaning of 19 U.S.C. § 1677(33)(F).

In finding on remand that MHI and Trading Company were affiliated, Commerce reviewed whether that new determination affected its previous decision to deduct commissions paid by MHI to Trading Company in connection with the Piedmont sale. *See* Remand Determ. at 12–13. The statute provides for the deduction of certain expenses from CEP, including commissions:

> [T]he price used to establish constructed export price shall also be reduced by—
>
> (1) the amount of any of the following expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise (or subject merchandise to which value has been added)—
>
> (A) *commissions* for selling the subject merchandise in the United States;

(B) expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties;

(C) any selling expenses that the seller pays on behalf of the purchaser; and

(D) any selling expenses not deducted under subparagraph (A), (B), or (C)[.]

19 U.S.C. § 1677a(d)(1)(emphasis added).

In its remand determination, Commerce explained,

> In deciding whether to continue to make an adjustment based on the commission, we considered whether, in light of the joint venture relationship, it was appropriate to rely on a commission between these two parties. If the nature of the relationships between the joint venture partners is such that any commission * * * received by the affiliated trading company agent may not be at arm's length, it should be disregarded, like an intra-company transfer. In such cases, [Commerce] would deduct from CEP the actual selling expenses incurred by the trading company pursuant to [19 U.S.C. § 1677a(d)(1)(C) and (D)]. In contrast, where the joint venture partners are otherwise independent of each other, the deduction may appropriately be based on the commission paid pursuant to [19 U.S.C. § 1677a(d)(1)(A)].

Remand Determ. at 13.

This Court has sustained Commerce's practice of treating commissions paid by the producer to an affiliated trading company as an intracompany transfer, rather than as a true commission, where the transfer merely serves as a reimbursement for the affiliated party's actual selling expenses. *See Floral Trade Council v. United States*, 23 CIT ____, ____, slip op. 99–10 (January 27, 1999) at 10. A decision "not to deduct commissions paid to affiliated [trading companies] is * * * reasonable to the extent that it fulfills the statutory objective of preventing double-counting." *Id.* at ____, slip op. 99–10 at 10–11 (citing *U.S. Steel Group v. United States*, 22 CIT ____, ____, 15 F. Supp.2d 892, 905 (1998)(holding that, "if because of the relatedness of the producer and U.S. selling agent expenses represented by the commissions are already accounted for by means of a deduction for selling expenses nominally made under another provision of 19 U.S.C.A. § 1677a(d) * * *, no additional commission deduction need be made."), *appeal docketed*, No. 99–1342 (Fed. Cir. Feb. 12, 1999)). Therefore, Commerce's interpretation of the statute in its remand determination was in accordance with law.

On remand, Commerce found that "there [was] no evidence on the record demonstrating that MHI and the Trading Company [had] any corporate relationships outside the joint venture and the agency relationship with respect to the Piedmont sale that would suggest that these parties [did] not operate at arm's length." Remand Determ. at 13–14. In other words, because Commerce determined that the commission paid by MHI to Trading Company was at arm's length, and therefore, not an intracompany transfer, Commerce deducted the commission from CEP despite finding the parties to be affiliated under

19 U.S.C. 1677(33)(F) rather than deducting U.S. selling agent expenses.

Commerce based its conclusion of an arm's length transaction on two findings: 1) the absence of a control relationship between MHI and Trading Company, and 2) the nature and terms of the commission itself. *See id.* at 14. As support for its finding of a lack of a control relationship, Commerce referred to its final determination. *See id.* There, Commerce concluded "that the degree of cross-ownership and the level of joint-financing between MHI and the trading company [were] not significant enough to be indicators of [control.]" *Japan Final* at 38,157.

Substantial evidence supports Commerce's findings. First, concerning cross-ownership, the record indicates that both MHI and Trading Company owned significantly less than five percent of each other's outstanding shares of stock during the period of investigation.[8] *See* MHI Supplemental Section A Response (Conf. Doc. 115)(Jan. 18, 1996) at A–29. Second, the record indicates that MHI and Trading Company did not have financing relationships with each other. *See id.* at A–30. Third, based on the proportions of sales made by MHI through Trading Company as compared to both the total sales made by Trading Company and the total sales made by MHI, Commerce reasonably determined that neither party was dependent on the other. *See Japan Final* at 38,157; *see also* MHI Supplemental Section A Response (Conf. Doc. 115)(Jan. 18, 1996) at A–30.

Moreover, Commerce "reviewed the nature and terms of the commission paid by MHI and the details of the Trading Company's contribution to the transaction, and [found] no evidence that the commission was anything but a transaction negotiated by two parties acting in their own interests." Remand Determ. at 14.

Commerce reasonably based its finding of an arm's length commission transaction between MHI and Trading Company on substantial evidence indicating the absence of a control relationship between the two parties, as well as on the nature and terms of the commission itself.[9] Therefore, the Court sustains Commerce's decision to deduct the commission paid by MHI to Trading Company under 19 U.S.C. § 1677a(d)(1)(A) because it was in accordance with law and supported by substantial evidence.

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[8] The statute states that "[a]ny person directly or indirectly owning * * * 5 percent or more of the outstanding voting stock or shares of any organization and such organization[]" are to be considered affiliated. 19 U.S.C. § 1677(33)(E). Given that neither MHI nor Trading Company held at least five percent of the other's outstanding stock, it was reasonable for Commerce to treat that evidence as support for the conclusion that neither party was "legally or operationally in a position to exercise restraint or direction over the other[.]" 19 U.S.C. § 1677(33).

[9] Goss argues that in deducting the commission from CEP, Commerce improperly "departed from its well-established practice[.]" Cmts. of Goss on Remand Determ. at 2. According to Goss,

> To determine whether the commission is made at arm's length, Commerce's standard practice is to compare the commissions paid to affiliated selling agents with those paid by the respondent to any unaffiliated selling agents in the same market. If there is no unaffiliated sales agent, Commerce generally compares the commission earned by the affiliated selling agent on sales of merchandise produced by the respondent to commissions earned by the affiliated selling agent on sales of merchandise produced by other unaffiliated sellers or manufacturers.

Id. at 3 (citing *LMI-LA Metalli Industriale S.p.A. v. United States*, 912 F.2d 455, 459 (Fed. Cir. 1990); *Coated Groundwood Paper From Finland*, 56 Fed. Reg. 56,363, 56,371–72 (Dep't Commerce, Nov. 4, 1991)(final determ.)).

The practice Goss refers to, however, is based on Commerce's pre-URAA treatment of commissions. "Treatment of commissions under the newly amended statute is not identical to that required by the [pre-URAA] statute[.]" *U.S. Steel Group*, 22 CIT at ___, 15 F. Supp.2d at 905.

V. *Foreign Like Product*

"In calculating profit margins for CV, Commerce relied on 19 U.S.C. § 1677b(e)(2)(A), which states that CV profit is to be based upon 'the actual amounts incurred and realized by the specific exporter or producer * * * in connection with the production and sale of a *foreign like product* * * *.'" *See Mitsubishi*, 22 CIT at ____, 15 F. Supp.2d at 828 (quoting 19 U.S.C. § 1677b(e)(2)(A)(emphasis added)). The statute defines "foreign like product" as,

> [M]erchandise in the first of the following categories in respect of which a determination * * * can be satisfactorily made:
>
> (A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
>
> (B) Merchandise–
>
> (i) produced in the same country and by the same person as the subject merchandise,
>
> (ii) like that merchandise in component material or materials and in the purposes for which used, and
>
> (iii) approximately equal in commercial value to that merchandise.
>
> (C) Merchandise–
>
> (i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,
>
> (ii) like that merchandise in the purposes for which used, and
>
> (iii) which the administering authority determines may reasonably be compared with that merchandise.

19 U.S.C. § 1677(16)(1994).

In *Mitsubishi*, TKS argued that Commerce should not have relied on § 1677b(e)(2)(A) because the findings that led Commerce to rely on CV rather than home-market prices in calculating NV constituted evidence that no foreign like product existed in the home market. *See Mitsubishi*, 22 CIT at ____, 15 F. Supp.2d at 828–29. Because Commerce did not explain which of the three statutory foreign like product definitions it relied upon in classifying LNPPs sold in the home market as foreign like product, the Court remanded this issue for Commerce's reconsideration. *See id.* at ____, 15 F. Supp.2d at 829.

On remand, Commerce explained that it had relied upon the definition of foreign like product at § 1677(16)(C) in making its determination. *See* Remand Determ. at 17. Commerce explained its basis for foreign like product under that section as follows:

> First, the LNPP[s] produced and sold in Japan by TKS were: 1) produced in the same country as the merchandise subject to the investigation (Japan); 2) produced by the same person (TKS); and 3) are of the same general class or kind as the merchandise subject to the investigation (LNPP). Second, the LNPP[s] sold in the home market were like the subject merchandise (LNPP) sold in the United States in the purposes for which they were used; i.e., both LNPP[s]

> were used to produce newspapers. Finally, * * * home market LNPP[s] may reasonably be compared to the subject merchandise (LNPP). The fact that it was not practicable to compare specific models of LNPP[s] is not the same as saying that home market LNPP[s] may not reasonably be compared with the subject merchandise (LNPP).

Id.

Commerce properly explained the statutory basis for its foreign like product determination in accordance with 19 U.S.C. § 1677(16)(C).[10] Commerce's application of what "may reasonably be compared" under 19 U.S.C. § 1677(16)(C)(iii) in this case, however, appears inconsistent with its previous interpretation of this requirement. In its remand determination, Commerce explained,

> So as not to unreasonably distort comparisons involving non-identical merchandise, [Commerce] does not compare subject merchandise sold in the United States to merchandise sold in the foreign market where the variable cost of manufacturing of the latter merchandise differs from the variable cost of manufacturing of subject merchandise sold to the United States by more than 20 percent of the total cost of manufacturing of the subject merchandise sold to the United States.

Remand Determ. at 15 (citing Import Administration Policy Bulletin 92.2 (July 29, 1992)).

In the above excerpt, Commerce referred to the difference in merchandise ("difmer") adjustment. Where the foreign like product is not identical to the subject merchandise, Commerce will adjust normal value for the "difference in cost attributable to the difference in physical characteristics" pursuant to 19 U.S.C. § 1677b(a)(6)(C)(ii). Import Administration Policy Bulletin 92.2 (July 29, 1992). Here, then, had Commerce based the home-market price on normal value, the difmer adjustment would have applied because Commerce compared non-identical home-market and U.S. LNPPs.

To determine whether there is a reasonable basis for comparing non-identical merchandise, Commerce applies the twenty percent difmer guideline. The policy bulletin Commerce cited in its remand determination explains as follows:

> To limit the potential differences in commercial value caused by physical differences, we employ the 20% guideline. If the commercial value of two products is greatly different, then a comparison is not reasonable; the difmer adjustment, being limited to variable manufacturing costs probably cannot fully compensate. * * * When the variable cost difference exceeds 20%, we consider that the prob-

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[10] TKS now argues that Commerce's foreign like product determination was not in accordance with law because "[Commerce] confused 'foreign like product' with 'the same class or kind' as the merchandise subject to the investigation[, yet] * * * the two are distinct categories of merchandise." Cmts. of TKS on Remand Determ. at 8. TKS's argument is without merit. The statute's foreign like product provision is comprised of a hierarchy of three alternative definitions. *See* 19 U.S.C. § 1677(16). Commerce relied on the third and broadest definition, which covers merchandise "of the *same general class or kind* as the merchandise which is the subject of the investigation[.]" 19 U.S.C. § 1677(16)(C)(emphasis added). Therefore, Commerce's interpretation of the foreign like product definition was consistent with the plain language of the statute.

> able differences in values of the items to be compared is so large that *they cannot reasonably be compared*. Since the merchandise is not identical, does not have approximately equal commercial value, and has such large differences in commercial value that it cannot reasonably be compared, the merchandise cannot be considered similar under [§ 1677(16)(A), (B), or (C)]. * * *
>
> There may be instances in which comparisons may be reasonable even if the diffmer [sic] is in excess of 20% of the cost of manufacture of the U.S. model. * * * The 20% guideline is, however[,] a point of departure in the analysis, and cannot be ignored. Any use of comparisons with greater than 20% diffmers [sic] must be explained. * * * Unless we can explain how the comparison remains reasonable, or distortion is minimized, we should not make comparisons when diffmers [sic] exceed 20%. Instead, when there is no other similar merchandise, we should revert to constructed value[.]

Import Administration Policy Bulletin 92.2 (July 29, 1992)(emphasis added).[11]

Thus, where the difmer adjustment would exceed twenty percent, Commerce cannot make a finding that merchandise is reasonably comparable, unless it can explain how the comparison nevertheless remains reasonable.

Here, it appears Commerce found that the difmer adjustment would exceed the twenty percent guideline. First, as quoted above, Commerce mentioned the twenty percent difmer guideline in its remand determination. *See* Remand Determ. at 15. Moreover, in its final determination, Commerce stated, "[T]he degree of unique customization for customers made the difference-in-merchandise adjustment for product price matching potentially so complex that the use of CV provided a more reliable and administrable methodology for establishing NV." *Japan Final* at 38,146. Finally, in its normal value memorandum, Commerce stated,

> [T]he petitioner's arguments fail to resolve the fundamental product comparability problems stemming from differences between the U.S. and Japanese LNPP markets[.] * * * The sheer extent of the physical differences demonstrate that the [petitioner's] proposed matches are between products separated by complex physical differences so numerous that the Department's normal reliance on [difmer] adjustments would become an analytical exercise equivalent to the use of constructive value.

Normal Value Mem. (Conf. Doc. 73)(Nov. 9, 1995) at 16–17.

Because Commerce appears to find that the difmer adjustment would exceed the twenty percent guideline, Commerce cannot conclude that the home-market and U.S. LNPPs "may reasonably be compared" under 19 U.S.C. 1677(16)(C)(iii) without explaining how the merchandise nevertheless remains comparable. *See* Import Administration Policy

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[11] Although the policy bulletin is dated 1992, Commerce continues to make the difmer adjustment to NV and employ the twenty percent difmer guideline under the URAA. *See* 19 U.S.C. § 1677b(a)(6)(C)(ii); 19 C.F.R. § 351.411(1998); *see also* Antidumping Manual, Ch. 8 at 49–52 (explaining that Commerce uses the twenty percent difmer guideline to determine whether there is a reasonable basis for comparing merchandise).

Bulletin 92.2 (July 29, 1992). As it stands, Commerce has not explained how the merchandise is still reasonably comparable. Moreover, TKS argues that Commerce's reasonable comparison finding under subparagraph (iii) of § 1677(16)(C) is not supported by substantial evidence. *See* Cmts. of TKS on Remand Determ. at 10. The Court agrees.

In its remand determination, Commerce stated, "In making fair value comparisons, [Commerce] identifies the 'foreign like product' by comparing the physical characteristics of subject merchandise with the physical characteristics of merchandise sold in the foreign market." Remand Determ. at 15 (citing *Stainless Steel Wire Rod From Spain*, 63 Fed. Reg. 40,391, 40,399 (Dep't Commerce, July 29, 1998)(final determ.)). Here, however, none of the record documents Commerce cited as support for its foreign like product determination indicates that the home-market and U.S. LNPPs were reasonably comparable in terms of their physical characteristics. *See* Remand Determ. at 24 (citing Normal Value Mem. (Conf. Doc. 73)(Nov. 9, 1995); Prelim. Concurrence Mem. (Conf. Doc. 152)(Feb. 23, 1996) at 10; *Japan Final* at 38,146–47).

Instead, each document that Commerce cited merely refers to a putative foreign like product, without discussing the factual support for the decision. For example, in the preliminary concurrence memorandum, Commerce merely stated, "[W]e have determined that the foreign like product consists of all LNPPs, additions, and components sold by the Plaintiffs in their respective home markets[.]" Prelim. Concurrence Mem. (Conf. Doc. 152)(Feb. 23, 1996) at 10. Moreover, rather than mention a single physical similarity, the bulk of the normal value memorandum discusses all the physical dissimilarities between home-market and U.S. LNPPs. *See* Normal Value Mem. (Conf. Doc. 73)(Nov. 9, 1995) at 6–17. The Court cannot review Commerce's foreign like product finding without an explanation of the decision's factual basis. *See SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943).[12]

The Court cannot sustain Commerce's foreign like product determination. The Court remands this issue for Commerce's reconsideration consistent with this Court's opinion. On remand, Commerce may either explain how the Japanese and U.S. LNPPs are reasonably comparable notwithstanding the twenty percent difmer guideline or find that no foreign like product exists. In addition, Commerce must establish that substantial record evidence demonstrates physical similarities Commerce for determining that a fair value comparison between Japanese and U.S. LNPPs can be made.

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[12] Commerce also cited certain questionnaire responses as admissions by TKS that it considered its home-market LNPPs to be a foreign like product. *See* Remand Determ. at 16 (citing TKS Sept. 27, 1995 Response (Conf. Doc. 15) Sec. A at A–7, A–8). In its brief, Commerce states that it "reasonably treated TKS's own admissions as relevant to * * * whether LNPPs from Japan could reasonably be compared with LNPPs from the United States." Def.'s Br. at 17. The Court disagrees with Commerce's characterization of TKS's questionnaire responses as "admissions." Upon reviewing TKS's statements, one could not reasonably conclude that TKS was conceding that its home-market LNPPs constituted a foreign like product. *See* TKS Sept. 27, 1995 Response (Conf. Doc. 15) Sec. A at A–5 to A–12. To the contrary, TKS's statements unambiguously express TKS's position that "there is no reasonable basis for comparison of the sales of LNPP additions by TKS in the United States and Japan." *Id.* at A–7. Therefore, TKS's section A questionnaire responses do not constitute substantial evidence for Commerce's foreign like product determination.

CONCLUSION

For the reasons set out above, Commerce's remand determination in Large Newspaper Printing Presses from Japan is remanded for Commerce to reconsider and explain its foreign like product determination in accordance with this Court's opinion. Commerce's remand determination is sustained in all other respects. Commerce shall complete its remand determination by Monday, July 26, 1999; any comments or responses are due by Wednesday, August 25, 1999; and any rebuttal comments are due by Thursday, September 9, 1999.

(Slip Op. 99–47)

E.I. DUPONT DE NEMOURS & CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND ARAMID PRODUCTS V.O.F. AND AKZO NOBEL ARAMID PRODUCTS INC., DEFENDANT-INTERVENORS

Court No. 97–08–01335

[ITA determination remanded upon consent.]

(Dated June 2, 1999)

Wilmer, Cutler & Pickering (John D. Greenwald, Ronald I. Meltzer, and *John A. Trenor)* for plaintiff.

David W. Ogden, Acting Assistant Attorney General, *David M. Cohen*, Director, *Velta A. Melnbrencis*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Mark L. Josephs), Mildred E. Steward*, Office of the General Counsel, United States Department of Commerce, of counsel, for defendant.

Adduci, Mastriani & Schaumberg, L.L.P (Barbara A. Murphy, Tom M. Schaumberg, and *Gregory C. Anthes)* for defendant-intervenors.

OPINION

RESTANI, *Judge:* This matter is before the court on plaintiff, E.I. DuPont De Nemours & Company's ("DuPont"), motion for judgment on the agency record pursuant to USCIT R. 56.2. Plaintiff, the domestic party petitioner before the Department of Commerce, challenges Commerce's antidumping duty determination in the second administrative review of its order on aramid fiber from the Netherlands. *See Aramid Fiber Formed of Poly Para-Phenylene Terephthalamide from the Netherlands*, 62 Fed. Reg. 38,058 (Dep't Commerce 1997) [hereinafter *Final Results*].

BACKGROUND

During the original less-than-fair-value ("LTFV") investigation, a wholly-owned subsidiary of the Dutch corporation, Akzo Nobel NV ("Akzo"), increased its equity holding in Aramid Products V.o.F. ("Ara-

mid")[1] from 50 to 95 percent. *See Aramid Fiber Formed of Poly-Phenylene Terephthalamide from the Netherlands*, 59 Fed. Reg. at 23,688. Commerce did not consider the corporate reorganization for purposes of the LTFV investigation because the reorganization took place after the period of investigation ended. *Id.* Commerce, however, accepted Aramid's and Akzo's corporate restructuring for purposes of the first administrative review. *See Aramid Fiber Formed of Poly Para-Phenylene Terephthalamide from the Netherlands*, 61 Fed. Reg. 51,406, 51,407 (Dep't Commerce 1996) (final results of antidumping admin. rev.) [hereinafter *First Review*]. Commerce states that it took this approach because the first administrative review covered the period following consolidation. Gov't Br. at 3.

During the first administrative review, having recognized the corporate restructuring, Commerce, for purposes of cost of production ("COP"), calculated "the respondent's net interest expense based on the financing expenses incurred on behalf of the consolidated group of companies to which the respondent belongs." *First Review*, 61 Fed. Reg. at 51,407. Commerce utilized this methodology because of Akzo's controlling interest in Aramid and the fungible nature of debt and equity. *Id.* The court upheld this approach in DuPont's challenge to Commerce's first administrative review. *E.I. DuPont de Nemours & Co. v. United States*, No. 96–11–02509, 1998 WL 42598, *3–5 (Ct. Int'l Trade Jan. 29, 1998) *("E.I. DuPont I")*.

Commerce followed the approach taken in the first administrative review in calculating Aramid's financing expenses in the second administrative review covering the period June 1, 1995, through May 31, 1996. *See Final Results*, 62 Fed. Reg. at 38,060. During the second review, Commerce requested that Aramid report its corporate structure and affiliations, *Commerce's Questionnaire* (Aug. 20, 1996), at A–3, P.R. Doc. 4, Def.'s App., Tab 1, at 4 [hereinafter *Commerce's Questionnaire],* in order to confirm that Aramid's corporate structure remained unchanged from the first administrative review, Gov't Br. at 4. Aramid responded that this structure had not changed, indicating that Akzo owned a 95 percent interest in the producing company. *Aramid's Questionnaire Section A Response* (Sept. 20, 1996), at 6, P.R. Doc. 10, Def.'s App., Tab 2, at 4 [hereinafter *Aramid's Section A].*

As part of its request for information relating to U.S. sales,[2] Commerce requested that Aramid report financing expenses as part of indirect selling expenses ("ISE"). *See Commerce's Questionnaire*, Def.'s App., Tab 1, at 6. In response, Aramid reported financing expenses and explained that the interest expenses component of the ISE was based upon information taken from Akzo's consolidated financial statements.

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[1] Aramid is a Dutch producer of PPD-T aramid fiber. *Aramid Fiber Formed of Poly-Phenylene Terephthalamide from the Netherlands*, 59 Fed. Reg. 23,684, 23,687 (Dep't Commerce 1994) (LTFV final determination). Akzo Nobel Aramid Products Inc. is Akzo's U.S. selling arm. *Commerce's Verification Report* (Feb. 21, 1997), at 2, C.R. Doc. 27, Def.'s App., Tab 9, at 2 [hereinafter *Verification Report*]. The U.S. parent company is Akzo Nobel, Inc., which is wholly owned by Akzo Nobel NV. *Id.*

[2] To determine the dumping margin, U.S. sales prices are compared to normal value, which may be based on home market sales, third country sales, or constructed value ("CV"), which reflects COP. 19 U.S.C. § 1677b (1994).

Aramid's Questionnaire Sections B-D Response (Oct. 25, 1996), at 111–112, C.R. Doc. 2, Def.'s App., Tab 3, at 3–4 [hereinafter *Aramid's Sections B-D*]. Similarly, Commerce requested that Aramid report its financial interest expenses related to COP. *See Commerce's Questionnaire*, at D–18, Def.'s App., Tab 1, at 7. In response, Aramid reported the net interest expenses associated with COP. *Aramid's Sections B-D*, at D–18, Def.'s App., Tab 3, at 17. As with the ISE, the interest expense component of COP was based upon the consolidated financial statements of Akzo. *Id.*[3]

Aramid submitted Akzo's consolidated financial statements as part of its response to the original questionnaire. *See generally Aramid's Section A*, P.R. Doc. 10, Def.'s App., Tab 2. These statements contained the financing costs incurred by Akzo on behalf of all of its subsidiaries. *See id.* at A–15 to A–16, Def.'s App., Tab 2, at 24–67. Commerce subsequently issued a supplemental questionnaire requesting additional financing information. *See Commerce's Supplemental Questionnaire* (Nov. 19, 1996), at 1–8, C.R. Doc. 8, Def.'s App., Tab 4, at 3–10. Commerce conducted verification of the costs and expenses that Aramid reported in its original and supplemental questionnaires in January and February of 1997. *See Commerce's Verification Outline* (Jan. 13, 1997), at 1, C.R. Doc. 13, Def.'s App., Tab 5, at 1.

In its first administrative review, Commerce isolated the various parts of Akzo's amortized goodwill and included within COP certain depreciation expenses related to devalued assets, but declined to account for the residual goodwill arising from Akzo's corporate restructuring. *See E.I. DuPont I*, 1998 WL 42598, at *5–6. This approach was upheld by the court. *Id.* at *8–9.

Commerce followed this approach in its treatment of Akzo's goodwill in the second review. *Final Results*, 62 Fed. Reg. at 38,063. In response to Commerce's section D questionnaire, Aramid indicated that it was reporting COP based upon the actual costs incurred during the POR. *Aramid's Sections B-D*, at 128, 139–140, Def.'s App., Tab 3, at 7, 9–10. Aramid also stated in this response that it was following the depreciation methodology used by Commerce in the first administrative review as part of Commerce's breakdown of goodwill. *Id.* at 128 n.26, Def.'s App., Tab 3, at 7 n.26. Accordingly, Aramid's reported cost of manufacturing ("COM") included the part of depreciation associated with the revaluation of Aramid's assets that occurred as part of the corporate restructuring. *Id.*

Commerce verified Aramid's COP and CV from January 27, through January 31, 1997. *Commerce's COP/CV Verification Report* (Feb. 21, 1997), at 1, C.R. Doc. 26, Def.'s App., Tab 8, at 1. During verification, Commerce confirmed to its satisfaction that Aramid had made a proper adjustment for depreciation associated with the revaluation of certain

[3] For U.S. ISE, Commerce used the consolidated financial data of Akzo Nobel, Inc., the U.S. parent company. *See Verification Report*, at Ex. 24, Def.'s App., Tab 9, at 19–20. For COP, Commerce used the consolidated financial data of Akzo Nobel, NV, the Dutch parent company of producer Aramid. Gov't Br. at 5 n.2, *see also Aramid's Section B-D Response*, at 161–162, Def.'s App., Tab 3, at 13–14.

assets. Gov't Br. at 10; *see also Exhibit 27 to Verification Report* (Feb. 21, 1997), C.R. Doc. 26, Def.'s App., Tab 10. Commerce also verified that Aramid had included that portion of goodwill appropriately associated with certain assets used in the cost of production. Gov't Br. at 10 (relying on figures found in *Exhibits 36 and 37 to Verification Report* (Feb. 21, 1997), C.R. Doc. 26, Def.'s App., Tab 11.). The final calculated dumping margin was 26.25 percent for Aramid's merchandise. *Final Results*, 62 Fed. Reg. at 38,064.

The issues raised by DuPont are: (1) whether Commerce erred in using Akzo Nobel, Inc.'s consolidated financial data to calculate the financial expense component of Aramid's U.S. ISE, (2) whether Commerce erred in using Akzo Nobel NV's consolidated interest expenses in calculating Aramid's COP, and (3) whether Commerce erred in excluding residual goodwill expenses arising from the earlier corporate restructuring from Aramid's COP.[4]

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994). In reviewing final determinations in antidumping duty investigations, the court will hold unlawful those agency determinations which are unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i) (1994).

DISCUSSION

DuPont asserts that remand is necessary as to the first issue involving the use of financial data from Akzo Nobel, Inc., the U.S. parent of Aramid's U.S. selling arm, for Aramid's U.S. ISE calculation, because Commerce did not address in the *Final Results* DuPont's arguments that the subsidiary's data should be used. Commerce's reasoning with regard to this issue is readily discernable and it fully disposes of DuPont's arguments. A court may uphold an agency decision if the agency's path is reasonably discernable. *Ceramica Regiomontana, S.A. v. United States*, 810 F.2d 1137, 1139 (Fed. Cir. 1987) (citing cases). Commerce's reasoning is exactly the same as that supporting its decision to use consolidated financial information of the foreign parent to compute COP of the Dutch subsidiary. *See Final Results*, 62 Fed. Reg. at 38,060. In sum, Commerce determined that the parent corporations and not the subsidiaries controlled financial structuring and their data provided the most accurate measures of financial costs. Remand to obtain further explanation is not necessary.

The remainder of DuPont's arguments as to the three issues before the court, and the responses thereto are essentially those that were presented in *E.I. DuPont I*. Defendant-intervenor Aramid argues that the court should not consider these issues further, should apply collateral estoppel principles to this case, and should find that DuPont is pre-

[4] All parties are agreed that remand is necessary to correct Commerce's use of constructed value when suitable above- cost home market sales were available for contemporaneous price to price comparisons. Accordingly, remand is permitted for this purpose.

cluded from raising the issues addressed in *E.I. DuPont I*. The Court of Appeals for the Federal Circuit requires that the following four conditions be met for issue preclusion to apply:

> (1) the issue previously adjudicated is identical with that now presented;
> (2) the issue was "actually litigated" in the prior case;
> (3) the previous determination of that issue was necessary to the end-decision then made; and
> (4) the party precluded was fully represented in the prior action.

Thomas v. General Servs. Admin., 794 F.2d 661, 664 (Fed. Cir. 1986).

Although the parties and legal issues are the same, and the issues were necessarily litigated and decided in *E.I. DuPont I*, Commerce's decision is based on the facts and arguments presented *as to this review period*. That is, although the methodologies at issue, which were found to be permissible under the statute, are the same, the calculations are different. Also, DuPont specifically challenged ISE in the second, but not in the first, review, and Commerce was required to reassess in the second review the corporate financing structure to determine if it had been altered from the first period of review. Further, Commerce reconsidered all of DuPont's arguments and was not prohibited from taking other reasonable approaches. DuPont was not precluded from trying to convince Commerce to change its methodologies. Thus, it appears that DuPont should not be precluded from, at least, having the court review Commerce's determination not to change its methodologies in the second review.[5]

Moreover, DuPont notes, neither this court, nor the Court of Appeals for the Federal Circuit, has found issue preclusion applicable in a trade case. In *PPG Indus., Inc. v. United States*, 978 F.2d 1232, 1239 (Fed. Cir. 1992), the court rejected the application of issue preclusion, observing that the factual record was different, including the fact that the time period in review was different. Even if this case is distinguishable from *PPG*, it is still far from clear that issue preclusion should be applied to trade cases.[6] A better approach might be to apply the type of *stare decisis* principles applied by the court in customs classification cases.

Res judicata principles (including issue preclusion)[7] do not apply in customs classification cases, unless the entries at issue are identical. *United States v. Stone & Downer Co.*, 274 U.S. 225, 235–37 (1927); *United States v. Boone*, 38 C.C.P.A. 89, 94, 188 F.2d 808, 810 (1951) ("doc-

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[5] DuPont is incorrect, however, in assuming the court fully considered the preclusion issue in denying its motion for extension of time to file appeal of the court's decision as to the first review. *E.I. DuPont De Nemours & Co. v. United States*, 15 F. Supp.2d 859 (Ct. Int'l Trade 1998). The parties did not discuss the issue and the court's decision did not rise or fall on DuPont's ability or inability to pursue the same issues in the future.

[6] As stated by this court in *PPG Indus., Inc. v. United States*, 13 CIT 297, 302, 712 F. Supp. 195, 199 (1989),

> The burden on the party seeking issue preclusion is and should be exacting. This is especially so in trade cases, since Congress has made specific provision for periodic administrative reviews in countervailing duty and dumping cases * * * Since the agencies involved perform the function of expert finders of fact concerning different programs, different time frames, economic statistics and other factors in countervailing duty and dumping investigations as well as similar functions during periodic reviews, principles of issue preclusion should be carefully applied. To hold otherwise would have a chilling effect upon the administrative processes envisioned by the Congress.

[7] In *Young Eng'rs, Inc. v. United States*, 2 Fed. Cir. (T) 9, 19, 721 F.2d 1305, 1314 (1983), the Court of Appeals adopted the view of *res judicata* as stated in the Restatement (Second) of Judgments (1984), that the term is a broad one, which includes the concepts of merger, bar, and issue preclusion.

trine [of *res judicata*] does not apply in cases involving classifications of imported merchandise."). Certain principles of *stare decisis*, however, do apply. *United States v. Mercantil Distribuidora, S.A.*, 45 C.C.P.A. 20, 23–24 (1957). Prior decisions with regard to classification of the same merchandise, unless clearly erroneous, govern as to other entries of the same goods. *Id.* ("public policy of putting an end to litigation and of not reopening questions which have been decided is a sound one, subject only to the qualification that clear error should not be perpetuated."). The doctrine does not apply if new evidence as to proper classification is presented. *Heraeus-Amersil, Inc. v. United States*, 13 CIT 764, 766 (1989) (citing *Schott Optical Glass Inc. v. United States*, 3 Fed. Cir. (T) 35, 36, 750 F.2d 62, 64 (1984)).

This was the approach advocated by the court on issues of statutory interpretation in trade cases in *American Lamb Co. v. United States*, 9 CIT 260, 262, 611 F. Supp. 979, 981 ("stare decisis counsels the court to follow the prior decisions."), *rev'd on other grounds*, 4 Fed. Cir. (T) 47, 785 F.2d 994 (1986). This makes sense even for methodological issues. While technically the factual basis may be different because different entries during different time periods are involved, if the determinative facts and legal arguments do not vary, judicial economy is served by application of *stare decisis* principles.

In any case, because the precedential value of prior judicial determinations of this court is not clear in trade cases, even where the parties are the same and the operative facts do not differ in any significant way, it is at least in the interest of judicial economy under current issue preclusion precedent for the court to consider these issues fully once more.[8]

The court has reviewed the legal arguments presented by the parties and the relevant facts of this review. They do not differ in any significant way from those of *E.I. DuPont I*, as the parties seem to acknowledge. Having fully considered the issues once again, the court arrives at the same conclusions. Accordingly, the court adopts the reasoning of *E.I. DuPont I* for purposes of this opinion and incorporates it by reference herein. Thus, the court sustains Commerce's determination, except that remand upon consent is ordered to consider suitable home market sales for contemporaneous price comparison purposes.

Commerce shall issue amended results within 45 days. Any objections to the new price comparisons shall be filed within 11 days thereof. Responses are due within 7 days thereof. If no objections are timely filed, defendant shall present a final proposed judgment to the court on the 15th day following its amended results.

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[8] Even if *stare decisis* principles applied, under customs practice with respect to a decision of the same level, that is, another CIT decision, the court would review the matter for clear error. *See Mercantil*, 45 C.C.P.A. at 23–4.

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C99/76 4/15/99 Ridgway, J.	Mattel, Inc.	96–2–00524	9502.10.2000 12% and 9502.10.0010 Free of duty for dolls 4202.92.4500 20% for clear plastic bags in which doll is contained	9502.10.2000 12% and 9502.10.0010 Free of duty for dolls and clear plastic bags	Agreed statement of facts	Los Angeles Slumber Party Barbie dolls, etc. and clear plastic bags in which dolls are contained and packaged
C99/77 4/22/99 Goldberg, J.	AMKO Int'l Trading Inc.	94–9–00520	2002.10.00 100% pursuant to 9903.23.17	2103.90.60 or 2103.90.90 7.5%, 7.3%, 7.1%	Agreed statement of facts	New York Canned tomato sauce preparation
C99/78 4/22/99 Goldberg, J.	AMKO Int'l Trading Inc.	95–9–01176	2002.10.00 100% pursuant to 9903.23.17	2103.90.60 or 2103.90.90 7.5%, 7.3%, 7.1%	Agreed statement of facts	New York Canned tomato sauce preparation
C99/79 4/22/99 Goldberg, J.	AMKO Int'l Trading Inc.	96–9–02248	2002.10.00 100% pursuant to 9903.23.17	2103.90.60 or 2103.90.90 7.5%, 7.3%, 7.1%	Agreed statement of facts	New York Canned tomato sauce preparation
C99/80 4/22/99 Goldberg, J.	Hafele America Co.	94–7–00386	7318.15.80 9.5%	7318.15.20 0.7%	Agreed statement of facts	Norfolk Hafele's Minifix connecting bolts, bearing the numerical designation "262.28.624"
C99/81 4/22/99 Goldberg, J.	Orlando	94–1–00079	2002.10.00 100% pursuant to 9903.23.17	2103.90.60 or 2103.90.90 7.5%, 7.3%, 7.1%	Agreed statement of facts	New York Canned tomato sauce preparation
C99/82 4/22/99 Goldberg, J.	Orlando Food Corp.	94–5–00290	2002.10.00 100% pursuant to 9903.23.17	2103.90.60 or 2103.90.90 7.5%, 7.3%, 7.1%	Agreed statement of facts	New York Canned tomato sauce preparation
C99/83 4/22/99 Goldberg, J.	Orlando Food Corp.	94–9–00521	2002.10.00 100% pursuant to 9903.23.17	2103.90.60 or 2103.90.90 7.5%, 7.3%, 7.1%	Agreed statement of facts	New York Canned tomato sauce preparation

ABSTRACTED CLASSIFICATION DECISIONS—*Continued*

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C99/84 4/22/99 Ridgway, J.	Parmalat U.S.A. Corp.	97–9–01505	2002.10.0000 100% pursuant to 9903.23.17	2002.90.0050 12.9%	Agreed statement of facts	Newark Pomi Chopped tomatoes
C99/85 4/22/99 Goldberg, J.	Rienzi & Sons	94–12–00743	2002.10.00 100% pursuant to 9903.23.17	2103.90.60 or 2103.90.90 7.5%, 7.3%, 7.1%	Agreed statement of facts	New York Canned tomato sauce preparation
C99/86 4/22/99 Goldberg, J.	Orlando Food corp.	95–3–00252	2002.10.00 100% pursuant to 9903.23.17	2103.90.60 or 2103.90.90 7.5%, 7.3%, 7.1%	Agreed statement of facts	New York Canned tomato sauce preparation
C99/87 4/22/99 Goldberg, J.	Pastene Co.	95–9–01150	2002.10.00 100% pursuant to 9903.23.17	2103.90.60 or 2103.90.90 7.5% or 7.3%	Agreed statement of facts	Newark Peeled plum tomatoes, tomato purie juice, basil, leaf, trace salt and citric acid preservative
C99/88 4/22/99 Goldberg, J.	Rienzi & Sons	95–11–01436	2002.10.00 100% pursuant to 9903.23.17	2103.90.60 or 2103.90.90 7.5%, 7.3%, 7.1%	Agreed statement of facts	New York Canned tomato sauce preparation
C99/89 4/27/99 Ridgway, J.	Huck Int'l, Inc.	97–5–00821	7318.29.00 5.1%	8308.20.30 0.3¢/kg.	Agreed statement of facts	Dallas MagnaLok® Blind Fasteners
C99/90 4/29/99 Ridgway, J.	Thatcher Tubes/ Courtaulds Packaging Plastic Tubes North America	98–5–01618	8443.50.50 2.6%	8443.19.90 Free of duty	Agreed statement of facts	Chicago K200 Decorating Line

C99/91 4/30/99 Aquilino, J.	Dornier Medical Systems, Inc.	95-7-00947	9018.90.70 4.2% (entry No. 322-3863719-6) 9018.90.70 4.2% (entry No. 322-4764119-3) 9018.90.75 4.2% (entry No. 322-5219219-3) 4.2%	9817.00.96 Free of duty for MFL 5000 lithotripters 9402.90.90 5.3% for operator's chairs (entry no. 322-3863719-6); 9817.00.96 Free of duty for MFL 5000 lithotripter 9402.90.00 5.3% for medical chair (entry No. 322-4764119-3) 9817.00.96 Free of duty for MFL 5000 lithotripter 9402.90.00 5.3% for medical chair	Agreed statement of facts	Not stated MFL 5000 lithotripters, etc.

ABSTRACTED VALUATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	VALUATION	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
V99/47 4/23/99 Musgrave, J.	Hayim & Co.	94–10–00606	Transaction value	Price paid or payable by the exporter/shipper to the sub-supplier or master weaver who produced the tufted rugs or hand-woven rugs for plaintiff [Note: invoice for "Revival" rugs should be classified under 5703.90.00 7.6%]	Nissho Iwai *v.* U.S., 16 CIT 86, 786 F. Supp. 1002 (1992), aff'd 982 F.2d 505 (1992)	Norfolk Tufted cotton rugs or other hand-woven rugs
V99/48 4/23/99 Musgrave, J.	Hayim & Co.	94–10–00648	Transaction value	Price paid or payable by the exporter/shipper to the sub-supplier or master weaver who produced the tufted rugs or hand-woven rugs for plaintiff	Nissho Iwai *v.* U.S., 16 CIT 86, 786 F. Supp. 1002 (1992), aff'd 982 F.2d 505 (1992)	Norfolk Tufted cotton rugs or other hand-woven rugs
V99/49 4/29/99 Ridgway, J.	Caterpillar Inc.	97–10–01832	Amount of refunded valued added tax was included by Customs Service in appraised value	Amount of value-added tax payments made by Caterpillar Inc. and subsequently refunded by government of the United Kingdom are not properly included in "price actually paid or payable" for subject merchandise when sold for exportation within the meaning of 19 U.S.C. 1401a(b)(1)	Caterpillar *v.* U.S., 941 F. Supp. 1241 (1996)	Houston Truck components

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